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Supreme Court of the United States

OCTOBER TERM [redacted] 1962

No. [redacted] 87

LOCAL NO. 438 CONSTRUCTION & GENERAL LABORERS' UNION AFL-CIO, PETITIONER,

vs.

S. J. CURRY, ET AL., ETC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

PETITION FOR CERTIORARI FILED APRIL 3, 1962
CERTIORARI GRANTED MAY 21, 1962

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 839

LOCAL NO. 438 CONSTRUCTION & GENERAL LABORERS' UNION AFL-CIO, PETITIONER,

vs.

S. J. CURRY, ET AL., ETC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

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[fol. 1]

IN THE SUPERIOR COURT OF FULTON COUNTY, GEORGIA

No. A-88617

Suit for Injunction

S. J. Curry, C. D. McKnight, Jr., E. G. Hightower and J. E. Tappan, doing business as S. J. Curry and Company, a partnership,

vs.

Construction and General Laborers Union, Local No. 438, AFL-CIO.

Bill of Exceptions—October 10, 1961

To the Supreme Court of Georgia:

Be It Remembered that on the 24th day of August, 1961 there was filed in the Superior Court of Fulton County the case of S. J. Curry, C. D. McKnight, Jr., E. G. Hightower and J. E. Tappan, doing business as S. J. Curry & Company, a partnership, as Plaintiff, against Construction and General Laborers Union, Local No. 438, AFL-CIO, an unincorporated association within the meaning of Title Three, Section 118, of the Code of Georgia Annotated, 1960 Supplement, as Defendant, being Case No. A-88617 in said Court; the same being an equitable petition seeking a temporary and permanent injunction against the defendant for alleged violation of Sections 54-804, 54-805 and 66-9906 of the Annotated Code of Georgia, 1933, it being alleged therein in substance that the petitioners were engaged in the business of a general contractor within the State of Georgia and had entered into a contract with the City of Atlanta for the construction of certain additions and improvements to sewage disposal facilities located at the South River Sewage Treatment Plant in the City of Atlanta; that in carrying out their contract with the City of Atlanta they engaged the services of various members of

the building and construction crafts and that they operated what is known as an "Open Shop" as required by the laws of the State of Georgia, that is, that membership in a labor [fol. 2] organization was not required as a condition of employment; that on or about August 10, 1961 the defendant caused a picket to appear in front of petitioners' construction project carrying a picket sign or placard bearing a legend that in substance said that petitioners had violated their contract with the City of Atlanta by failing to pay wages conforming with those of a similar type of work in the Atlanta area; that the presence of said picket immediately created a job disruption by causing employees of other contractors working on the same project to leave the job site and by preventing the delivery of supplies and materials to the job site and that these conditions had effectively deprived the petitioners from lawfully engaging or continuing to engage in the proper and lawful pursuit of their business and had also deprived many of petitioners' employees of the right to work; that the petitioners had no labor dispute of any kind with any of their employees or with any labor organization representing their employees, but notwithstanding this the presence of the picket placed on the job site by defendant was effectively interfering with the petitioners' contract with the City of Atlanta so as to make performance of this contract impossible, causing the petitioners to suffer irreparable and incalculable injury or damage. The petition contained prayers seeking injunctive relief restraining the defendant from picketing or causing the picketing of the construction job of the petitioners and from taking any action which would directly or indirectly cause a job stoppage or disruption and to restrain the defendant from interfering with the rights of the petitioners' employees to work.

Be It Further Remembered that pursuant to a show cause order signed in said case, the matter came on for interlocutory hearing before the Honorable Ralph Pharr, Judge of the Superior Court of Fulton County, on the 12th day of September, 1961. At said hearing the plaintiffs [fol. 3] introduced into evidence their sworn petition and also introduced the affidavits of S. J. Curry (identified and

attached hereto as Exhibit "A" and made a part of this Bill of Exceptions), B. L. Humphreys (identified and attached hereto as Exhibit "B" and made a part of this Bill of Exceptions), W. R. Griffin (identified and attached hereto as Exhibit "C" and made a part of this Bill of Exceptions), and George C. Rowland (identified and attached hereto as Exhibit "D" and made a part of this Bill of Exceptions). The defendant introduced into evidence the affidavits of James Moore (identified and attached hereto as Exhibit "E" and made a part of this Bill of Exceptions), William Wilson, (identified and attached hereto as Exhibit "F" and made a part of this Bill of Exceptions), P. D. Christian (identified and attached hereto as Exhibit "G" and made a part of this Bill of Exceptions), James H. Kaminer (identified and attached hereto as Exhibit "H" and made a part of this Bill of Exceptions), William Owen Thomas (identified and attached hereto as Exhibit "I" and made a part of this Bill of Exceptions) and Kenneth E. Goodwin (identified and attached hereto as Exhibit "J" and made a part of this Bill of Exceptions).

Be It Further Remembered that after the introduction of the foregoing evidence the Honorable Ralph Pharr announced that he would like to question James Moore (whose affidavit had been introduced into evidence by the Court as aforesaid) and thereupon James Moore was sworn and testified substantially as follows:

> Mr. Moore testified that in his capacity as President of the Atlanta Building Trades Council he acted merely as a representative of that organization at a meeting on February 14th at the construction site of the South River Sewage Treatment Plant with Mr. S. J. Curry, of S. J. Curry & Company, in Atlanta, Georgia. He stated that his only purpose at the meet- [fol. 4] ing was to introduce the various business agents of the member unions of the Atlanta Building Trades Council to Mr. Curry. He stated that he had no further conversations with Mr. Curry beyond these introductions but that he did recall hearing several of the business agents request of Mr. Curry to raise the wage level on the South River Sewage Treatment

Plant so the wages would meet the prevailing wages in the Atlanta area. Mr. Moore testified that he could not hear all of the conversation and other than the wage question he did not know what was said at the conference. Mr. Moore testified that he had not made any demands on Mr. Curry in regard to using union labor on this job and as far as he knew no such demands were made. Mr. Moore further stated that he had had no further conferences with Mr. Curry since February 14, 1961 until a meeting of Public Works Committee #2 of the City of Atlanta in the City Hall of the City of Atlanta at which time he saw Mr. Curry again but, of course, had no conference with him. Mr. Moore further testified that after the conference on the job site of February 14th he had gone to the City Attorney of Atlanta, Mr. Jack Savage, in an effort to bring about some correction of the wage condition on the Curry job. He stated that thereafter Mr. Savage wrote a letter to Mr. Ray Nixon as Chief of Construction for the City of Atlanta advising him of the wage situation.

Mr. Moore was then examined by counsel for petitioners and testified in substance that he did not know what transpired at the meeting of February 14th other than a request of several business agents upon Mr. Curry to pay the prevailing wage on his job. He stated [fol. 5] that he recalls Mr. Curry did say that he was unable to pay the prevailing wage because he had gotten the job at such a low bid and that he could just not afford to pay a higher wage.

Thereupon counsel for the defendant questioned the witness, James Moore, and he further testified that as a result of his contact with the City Attorney a letter was sent to the Chief of Construction for the City of Atlanta. Mr. Moore testified that as a result of this letter a meeting was held by Public Works Committee #2, composed of Aldermen of the City of Atlanta, in an effort to determine whether there had been any contract violation by Curry with the City of Atlanta. Mr. Moore stated that this meeting was held as a result of his efforts through the City Attorney and that he had pushed this meeting to try to correct a wage situa-

tion that he felt was detrimental to the welfare of workers and craftsmen in the Atlanta area.

Be It Further Remembered that after introduction of the foregoing evidence and after hearing argument of counsel, the Honorable Ralph Pharr entered an order denying the temporary injunction sought by the plaintiffs.

To said ruling and judgment of the Court the plaintiffs excepted, now accepts and assigns the same as error upon the ground that the ruling is contrary to law in that the evidence demanded a finding that the conduct of the defendant had effectively interfered with the proper, lawful or peaceful use of enjoyment of plaintiffs' property and the carrying out of their business on a construction project located in Fulton County, Georgia, as set forth in plaintiffs' petition and further demanded a finding that the [fol. 6] conduct of the defendant actively interfered with the pursuit of the lawful enjoyment of petitioners' employees and further that the conduct of the defendant created conditions so that carriers and suppliers had effectively been prevented from delivering or supplying materials to the construction site of the petitioners, all of which acts were a clear violation of what is commonly known as the right to work statutes of the State of Georgia, as set out in Sections 54-804, 54-805 and 66-9906 of the Annotated Code of Georgia, 1933, and this is true, irrespective of whether the facts contained on the picket sign of defendant were correct or incorrect as such facts are completely irrelevant to the question of whether or not the defendant had violated the foregoing statutes; and for said reasons the plaintiffs were entitled as a matter of law to an injunction enjoining the defendant from such unlawful conduct.

Be It Further Remembered that the order and judgment entered in said case on September 12, 1961 denying the temporary injunction sought under the petition is a final order subject to review by this Court.

S. J. Curry, C. D. McKnight, Jr., E. G. Hightower and J. E. Tappan, doing business as S. J. Curry & Company, a partnership, name themselves as Plaintiffs in Error, and Construction and General Laborers Union, Local No. 438,

AFL-CIO, as Defendant in Error in this Bill of Exceptions and hereby assigns error on the judgment and order of the Court in refusing to grant the temporary injunction prayed for and says that the Court erred in said order on the ground that the same was contrary to law for the reasons above set out and that the Court should be overruled and reversed.

The Plaintiffs in Error specify, as material to a clear understanding of the errors complained of, the following parts of the record:

(1) The original petition filed on August 24, 1961 together with a show cause order thereon but omitting the acknowledgment of service by the defendant; and

[fol. 7] (2) The order of the Court denying an interlocutory injunction entered and filed on September 12, 1961.

Be it further remembered that at the conclusion of the aforementioned interlocutory hearing, it was agreed and stipulated between the parties, through counsel, that the petitioners had purchased more than $50,000.00 worth of goods and commodities from out of the State of Georgia which had been shipped to petitioners' construction project at the South River Sewage Treatment Plant. It was further stipulated and agreed, without in any way waiving the question of relevancy, that the following language was contained in the contract existing between the City of Atlanta and the petitioners, as referred to in the petition:

"Wages will conform with those being paid on similar types of work in the Atlanta area."

And Now Comes S. J. Curry, C. D. McKnight, Jr., E. G. Hightower and J. E. Tappan, doing business as S. J. Curry & Company, a partnership, within the time provided by law and assigns error on the grounds complained of as contrary to law, and tenders this their Bill of Exceptions, and prays that the same be certified and transmitted to the Supreme Court of Georgia in order that the alleged errors may be considered and corrected, all as provided by law. The Supreme Court of Georgia having jurisdiction for the reason that exclusive jurisdiction of this case has been

conferred upon said Court by the Constitution of Georgia, this being a suit in equity seeking equitable relief.

This the 10th day of October, 1961.

Perry, Walters & Langstaff, By Robert B. Langstaff, Attorneys for Plaintiffs in Error.

Notice of presenting Bill of Exceptions as required by Section 6-908.1 of the Code is hereby waived.

This the day of October, 1961.

John S. Patton, Attorney for Defendant in Error.

[fol. 8]

EXHIBIT A TO BILL OF EXCEPTIONS.

STATE OF GEORGIA
FULTON COUNTY

S. J. CURRY & COMPANY, a partnership composed of S. J. CURRY, C. D. McKNIGHT, JR., E. G. HIGHTOWER and J. E. TAPPAN

vs.

LOCAL #438 of the CONSTRUCTION AND GENERAL LABORERS UNION—AFL CIO

AFFIDAVIT OF S. J. CURRY

I, S. J. Curry, a partner of S. J. Curry & Company, a partnership composed of myself, C. D. McKnight, Jr., E. G. Hightower, and J. E. Tappan, first being duly sworn make this affidavit for use in the above stated matter. S. J. Curry & Company is engaged in the business of general contractor within the State of Georgia and performs various kinds of construction work throughout the State. On November 15, 1960, the partnership entered into a contract with the City of Atlanta for construction of certain additions and improvements to the Sewage Disposal facilities located at the South River Sewage Treatment Plant in the City of Atlanta. Under the terms of this contract, the

partnership was to undertake the construction of certain designated improvements and additions to the existing sewage disposal plant and under the terms of our contract, we were to complete the contract within 540 consecutive days from December 5, 1960.

In undertaking the construction and completion of the improvements and additions contemplated under our contract, we have engaged the services of varying numbers of workmen engaged in the building and construction crafts, such as carpenters, iron workers, brick masons, common laborers, cement finishers and the like. We operate what is known as an "Open Shop" and to this extent we make absolutely no discrimination as to whether any prospective employee is or is not a member of any labor organization. [fol. 9] The nature of our contract with the City of Atlanta at the South River Sewage Treatment Plant requires that we work closely and directly with other contractors on the same job who have been given or awarded the electrical and plumbing work connected with the project. The electrical work on this job has been contracted to G. L. Gerlach Electric Company, of Fulton County, Georgia, by the City of Atlanta and all plumbing work has been contracted by the City of Atlanta to Gowdy and Durken, Inc., of Fulton County, Georgia. We have absolutely no contract or supervision of these contractors as their contracts are directly with the City of Atlanta.

As previously stated, our work on this job has been conducted on an Open Shop basis and we have no contracts with any labor organizations in regard to any of our employees on this job. Shortly after we had started construction on this job and around the 1st of January, 1961, I received word from my Job Superintendent, Mr. B. L. Humphreys, Jr. that he had been visited at the job site by representatives of various local unions in the Atlanta area. These representatives wanted to arrange a conference with me and pursuant to this request and on or about February 14, 1961, I came to Atlanta, Georgia, to meet with representatives of various unions in this area, including a representative of the Construction and General Laborers Union, Local #438. This meeting was held in the Field Office of my company at the aforementioned job site and there were

some 15 to 18 business agents and representatives of various unions present at this meeting. In addition, there was a representative of the Building Trades Council of Atlanta, who I remember to be a Mr. Moore and he appeared to be spokesman for the group.

Mr. Moore told me they were interested in having our company work unions members on our project. He stated that there were several other projects in the Atlanta area involving sewage plant construction on which workmen [fol. 10] were being furnished through the local labor unions. He stated that the local unions had ample labor supply and would like very much to furnish their members on our work. There was some discussion by other representatives present and when this was concluded, I advised Mr. Moore and those present that we would not be able to work union members exclusively since we operated our business on an Open Shop basis. At this point I was told by Mr. Moore and other representatives of the unions that they would use every means at their command to see that we did use union workmen on our project. I told them that this was their prerogative and at that point, the meeting was dismissed. Thereafter I had no further contact with any member of this group or any union represented by the group until on or about August 10, 1961, when the Construction and General Laborers Union, Local #438, placed a picket at the main entrance of our job site at the South River Sewage Treatment Plant. Since August 10, 1961, a single picket has patrolled or picketed the main entrance of our job by walking up and down carrying a placard sign which bears the following legend:

> "S. J. Curry & Company, Inc. violating contract with City of Atlanta by not paying wages conforming with those of a similar type of work in the Atlanta area. CONSTRUCTION AND GENERAL LABORERS UNION 438 AFL CIO."

Since the picket was established, all employees of the G. L. Gerlach Electric Company and Gowdy and Durken, Inc. walked off the construction site and have refused and continue to refuse to work. At the time the picket was

first established we had employed approximately 72 men and as previously stated, we had no labor disputes with any of these men nor any labor organization, and according to the best of my knowledge, no labor union represented these men. Since the picket was established we immediately began having difficulty receiving materials and supplies be- [fol. 11] cause of the refusal and failure of truck drivers to cross the established picket line. The absence of the other contractors' employees from the job, coupled with the refusal of truck drivers to deliver supplies and materials created a situation in which we were compelled to discharge or lay off employees who were otherwise willing to work. At the time of making this affidavit, our work force has dropped to 37 employees and will continue to drop until the job reaches a complete standstill.

As a direct result of the picket line, we have been effectively deprived of much of the use of the machinery and equipment we have on this job site because of the curtailment of the work. In addition we have had to discharge valuable employees who will become scattered and perhaps non-available if and when we can return to work on a full time basis.

The presence of the picket line established by the Construction and General Laborers Union #438 has effectively interfered with our contract with the City of Atlanta in that we will be unable to complete the work contemplated under this contract within 540 consecutive calendar days allowed. The contract carries a penalty clause of $50.00 a day for every day in excess of 540 days it requires to complete the work. Over and above the actual contract penalty clause, my company will suffer considerable loss, which it is impossible to estimate, by continued overhead and operating costs, notwithstanding the fact that we are unable to perform, plus the loss from idle machinery and equipment, the necessity of warehousing goods, and the loss of a previously well organized working force.

Neither I nor any member of my company have received any subsequent calls or requests for conferences from either the Construction and General Laborers Union, Local 438, or any member of the Building Trades Council of Atlanta. We received absolutely no notice of the picket

other than its presence on the morning of August 10, 1961. [fol. 12] From my 30 years experience in the construction business and from the experiences I have had with labor disputes, strikes, and picketing I can definitely state that the placing of a picket in front of a construction site such as ours at South River Treatment Plant is a commonly accepted and established sign or signal used by craft unions to designate a particular job "On Strike", so that all employees on that particular job will refrain from working.

This 11th day of September, 1961.

/s/ S. J. Curry
S. J. Curry

Sworn to and subscribed before me this
11th day of September, 1961.

/s/ Mrs. Brandon Gamble
Notary Public, Fulton County, Georgia

[fol. 13]

Exhibit B to Bill of Exceptions

No. A-88617

Fulton Superior Court

S. J. Curry & Co., a partnership composed of S. J. Curry, C. D. McKnight, Jr., E. G. Hightower, and J. E. Tappan,

Plaintiffs,

vs.

Local No. 438 of the Construction and General Laborers Union AFL CIO,

Defendant.

State of Georgia,
County of Fulton:

Affidavit of B. L. Humphreys, Jr.

B. L. Humphreys, Jr., of DeKalb County, Georgia, having first been duly sworn, deposes and says:

I am superintendent for S. J. Curry & Company on the construction project presently under construction at the South River Sewage Treatment Plant in the City of Atlanta. I have been employed by S. J. Curry & Company in my capacity as job superintendent for about four years, and I worked with them prior to that time for an additional seven years.

On or about December 5th, 1960, the improvement and additions to the South River Sewage Treatment Plant that had been contracted for by S. J. Curry & Company with the City of Atlanta were assigned to me as job superintendent, and I came to Atlanta on or about that date for the purpose of instituting construction.

I was in charge of all employment for this job and it was my responsibility to see that necessary workmen were hired to satisfactorily complete the job. This job has been an open shop job from the beginning and no effort was made to require union membership as a condition of em- [fol. 14] ployment. By "open shop" I mean that we did not require union membership as a condition of employment, but rather we hired all crafts and common laborers needed on the job without regard to any union affiliation.

Shortly after the first of the year, 1961, and in the early part of January I was contacted on the job site by several representatives of various trade unions in regard to using union workmen on this particular job. I told these individuals that I had no authority to speak for the company, but that I would arrange a conference between them and Mr. S. J. Curry, who is senior partner of S. J. Curry & Company.

14th B.L.H.

Thereafter, and on or about February ~~12~~th, 1961, I arranged a conference on the job site between Mr. Curry and the representatives of the various unions comprising the Atlanta Trades Council. I attended this meeting although the company's position was handled by Mr. Curry himself. As I recall, the general gist of the conversation was that the representatives of the various unions present and the representative of the Atlanta Trades Council wanted S. J. Curry & Company to use union workmen on this particular job, and after some discussion Mr. Curry told them that he

did not see where he could go along with them and at this time the meeting broke up, after the spokesman for the group stated that they would use every means at their disposal to see that we did use union men on this job.

Thereafter I had no additional contacts, meetings or conferences with any labor organizations or representatives of labor organizations, except that I do recall two business agents did come to the job and inquire in regard [fol. 15] to the status of certain of my subcontractors.

On or about August 10th, 1961, and in the early morning a picket was placed on my job by the Construction and General Laborers Union Local No. 438. As I recall, the picket was placed there shortly after eight o'clock and thereafter the electricians and plumbers who were working for other contractors on the same job site left the job and have not returned since that date, up to and including the present time. The electricians and plumbers work for other contractors who had contracts directly with the City of Atlanta for the electrical and plumbing work on this job. I had no control over these employees and no supervision over them.

The picket line consisted of a single picket walking up and down in front of the main entrance to this job, carrying a sign or placard which bore the following legend: "S. J. Curry & Company, Inc., violating contract with City of Atlanta by not paying wages conforming with those of a similar type of work in the Atlanta area. Construction and General Laborers Union, 438, AFL CIO" This picket came to the job each morning, and still does, around seven-thirty and stays on the job until we knock off or stop work around three-thirty. The picket has been there continually since August 10th on working days.

When the picket line was established on August 10th, I immediately had some difficulty with delivery of supplies and material to this job. In particular, a load of cast iron pipe from American Cast Iron Pipe Company from Birmingham, Alabama, was not delivered to the job site because of the refusal of the driver of the truck to cross the picket line. The pipe was unloaded outside of the gate and [fol. 16] I was required to use my own men to transport the pipe onto the job proper. On another occasion a load

of concrete from MacDougald-Warren Concrete Company in Atlanta was ordered for the job, but the driver refused to cross the picket line and the concrete was not delivered. As I recall, this attempted concrete delivery was on or about August 21st, 1961. There have been several other instances in which drivers have refused to cross this picket line, and I have been unable to get materials and supplies needed on the job site.

Due to the nature of the work on this construction project and the fact that our work progresses with the work of the electricians and plumbers, this absence of the electricians and plumbers from the job caused an immediate and serious interruption in the progress of the job. Because the electricians were not available to lay conduit, and the plumbers to lay pipe, I was compelled to stop the forming on concrete walls and the pouring of concrete walls and slabs connected with this particular type construction. As a direct result of this curtailment of work, I have had to reduce my work force from seventy-two on August 10th to about thirty-seven as of the date of this affidavit. All of the men that I have laid off or discharged were ready and able and willing to continue their work, but because of the lack of work I was simply unable to continue their employment. As far as I know, none of these men are members of any labor organization. Since August 10th, 1961, the work which was contracted by S. J. Curry & Company has steadily decreased and I have had a considerable amount of machinery and equipment left idle and unused because of the job interruption. In addition to idle equipment, I have had to [fol. 17] store and warehouse goods and material on the job site which ordinarily would have already been installed, and as previously mentioned, I have lost an otherwse well-organized working force. In addition, a large amount of form work for concrete floor slabs has deteriorated considerably due to the lengthy exposure to the elements. In order to recondition forms that I have already constructed so that concrete can be poured, it will be necessary to go back and rework these forms and at considerable additional expense and cost. As previously stated, our contract calls for construction of these forms, but we are unable to complete the pouring of the forms and the formation of slabs

until the electrical conduit and plumbing connections are inserted in the forms.

There is absolutely no labor dispute existing between the company and any of my employees, and all of them stand ready and willing to work.

/s/ B. L. Humphreys, Jr.
B. L. Humphreys, Jr.

Sworn to and subscribed before me,
this 12th day of September, 1961.

/s/ Mitchell M. Shugart
Notary Public

My Commission Expires: July 26, 1963

[fol. 18]

Exhibit C to Bill of Exceptions

Georgia, State of
Fulton County

S. J. Curry & Company, a partnership composed of S. J. Curry, C. D. McKnight, Jr., E. G. Hightower and J. E. Tappan

vs.

Local #438 of the Construction and General Laborers Union—AFL CIO

Affidavit of W. R. Griffin

I, W. R. Griffin, of Carroll County, Georgia, having first been duly sworn deposes and says that I am a carpenter by trade and have been so engaged for the past twenty years. On or about the middle of January, 1961 I was employed by S. J. Curry & Company to do carpentry work on the additions and improvements being constructed by this company at the South River Sewage Treatment Plant in the City of Atlanta. My employment at this job site with S. J.

Curry & Company continued relatively uninterrupted until about August 18, 1961 when I was laid off by the job superintendent, Mr. B. L. Humphreys, Jr. for lack of work. Mr. Humphreys explained to me at that time that the lack of work was caused by the presence of a picket line which had been established on the job on or about August 10th. I told Mr. Humphreys then that I was ready and willing to work and wanted to work but he told me that because the picket line had caused some of the electricians and plumbers to walk off the job that he just didn't have any work.

[fol. 19] I stayed off the job and did not work elsewhere until August 28 when I returned to work back at the job site and worked until September 1, 1961 when I was again laid off and I have not worked at this job site since or any where else. I am ready and able to return to work as a carpenter to the South River Sewage Treatment Plant for S. J. Curry & Company and would like to return there as soon as the work picks up. This the 11th day of September, 1961.

/s/ W. R. Griffin
W. R. Griffin

Sworn to and subscribed before me this the 11th day of September, 1961.

/s/ Anne Phillips
Anne Phillips, Notary Public, Georgia
State at Large
My Commission Expires Mar. 29, 1964

[fol. 20]

EXHIBIT D TO BILL OF EXCEPTIONS

GEORGIA, STATE OF
FULTON COUNTY

In re S. J. CURRY & COMPANY, a partnership composed of S. J. CURRY, C. D. MCKNIGHT, JR., E. G. HIGHTOWER and J. E. TAPPAN

vs.

LOCAL #438 of the CONSTRUCTION AND GENERAL LABORERS UNION—AFL CIO

AFFIDAVIT OF GEORGE C. ROWLAND

I, George C. Rowland, of Fulton County, Georgia, first being duly sworn deposes and says that I am employed by Mac-Dougald Warren, Inc. in the capacity of Plant Manager, at the concrete plant located at 3600 Browns Mill Road. I have occupied the position of Plant Manager for approximately five (5) years and in this capacity, I am responsible for the dispatching of all ready mixed concrete pursuant to orders that are received in this plant.

Prior to August 10, 1961, my company had been furnishing ready mixed concrete to S. J. Curry and Company at the South River Sewage Treatment Plant in the city. We have been supplying ready mixed concrete to this job site since it started. On or about August 10, 1961, I learned that a picket had been established at the entrance of this job site. Thereafter and specifically on August 21, 1961, Truck #16 driven by Harvey Lee Brumbelow was dispatched to said job site with one cubic yard of ready mixed concrete. The driver left the plant at approximately 12:38 P. M. but returned to the plant at 1:15 P. M. with the concrete undelivered. The driver called me from the job site and informed me that there was a picket on the job site and he could not deliver the concrete because it would require crossing the picket line. Accordingly, he returned to the

plant at approximately 1:15 P. M. on the same date, having failed to deliver the concrete.

This 11th day of September.

/s/ George C. Rowland
George C. Rowland

Sworn to and subscribed before me
this 11th day of September, 1961

/s/ Mrs. Brandon Gamble
Notary Public, Fulton County, Georgia

[fol. 21]

Exhibit E to Bill of Exceptions

Fulton Superior Court

Case No. A 88617

S. J. Curry & Company

vs.

Local No. 438 Construction & General Laborers Union, AFL-CIO

Affidavit of James Moore

State of Georgia,
County of Fulton.

I, James Moore, being first duly sworn, do solemnly make oath as follows:

My name is James Moore. I am Business Representative of the Atlanta Building Trades Council.

In my capacity as a representative of the Atlanta Building Trades Council I am familiar with the wages being paid in the Atlanta, Georgia, area to the various building trades crafts for construction of sewage disposal plants and similar construction. It is a part of my responsibility to have such knowledge and to work with the various building

trades unions in an attempt to maintain said standards in the Atlanta, Georgia, area.

I know of my personal knowledge that Arthur Pew Construction Company, Inc., of Atlanta, Georgia has engaged in the following construction in the Atlanta, Georgia, area subsequent to July, 1959; watermain construction at Atlanta, Georgia, on Bolton Road, watermain construction in DeKalb County, Georgia, watermain construction, Atlanta, Georgia, on Moores Mill Road, water treatment plant in Atlanta, Georgia, on Bolton Road, sewer line construction in DeKalb County, Georgia, on the South River and sewage treatment plant at Kennesaw, Georgia.

During said period all carpenters on said jobs were paid at the following rate: July 1, 1959, to January 1, 1960, $3.20; January 1, 1960, to July 1, 1960, $3.25; July 1, 1960, to the present $3.35.

[fol. 22] In the year 1960 G. E. Tillman Company, Inc., constructed a sewage treatment plant known as Sewage Treatment Plant Improvements Contract B, Atlanta, Georgia. In said construction the company employed six operating engineers who were paid $3.67½ per hour, four carpenters who were paid $3.35 an hour, ten iron workers who were paid $3.60 an hour, twelve plumbers and pipe fitters who were paid $3.85 an hour, and fifty laborers who were paid $2.00 an hour, and eight brickmasons who were paid $4.00 an hour.

A company known as Halpin, Inc., Avondale Estates, Georgia, engaged in construction of a sewage disposal plant in DeKalb County, Georgia, said construction being during the year 1960, and 1961 and on said job the following wages were paid: carpenters, $3.35 per hour; cement finishers, $3.30 an hour; operators $3.67½ per hour; oilers $2.57½ per hour; bricklayers, $4.00 an hour, laborers $2.00 per hour.

P. D. Christian Company, of Atlanta, Georgia, have since July 1, 1960, paid $3.35 to all carpenters; Gowdy & Durkin, Inc., is paying on the South River sewage treatment plant, Atlanta, Georgia, $4.00 per hour to plumbers and steam fitters; C. L. Gerlach Electric Company is paying to electricians, foremen $4.35 per hour, journeymen $4.00 an hour, apprentice third year $2.40 an hour; apprentice second six months $1.95 an hour.

The above wages conform to the wage scale as approved under the Davis-Bacon Act, of the U. S. Department of Labor.

There is a lower scale for road construction. This is because of the fact that practically all construction of roads is hidden work and does not call for anything like the same skills as does other construction. There is a great deal of construction above the ground in sewage disposal plants and the construction in sewage disposal plants calls for high skills unrelated to those in road construction, and road construction has never been a criteria as a wage scale for the wages to be paid on sewage disposal plants or related points.

[fol. 23] A contract was signed by the plaintiff in this cause and the City of Atlanta for construction work on the South River sewage disposal plant, which contract contained the following clause:

> "Wages will conform with those being paid on similar types of work in the Atlanta area."

Notwithstanding said contract with the City of Atlanta, I know of my own knowledge and know from statements made by officials of the plaintiff that S. J. Curry & Company has never paid the wages hereinabove set forth, which are prevailing wages in the Atlanta, Georgia, area for similar construction, during any of the time it has been engaged in the construction of the said sewage disposal plant for the City of Atlanta. In most instances the wages are only a little over half of the prevailing wage.

I have on repeated occasions on behalf of the Atlanta Building Trades Council attempted to persuade the plaintiff to comply with its contract with the City of Atlanta, which above clause having been placed in the contract for the benefit of the various crafts which are members of the Atlanta Building Trades Council, and the company has utterly and completely failed to live up to its contract. I have conferred with various officials of the City of Atlanta, including Mr. J. C. Savage, City Attorney of the City of Atlanta, and have at all times made plain to Mr. Savage that we were not complaining about the individuals being

employed and that were not in any way seeking to force the plaintiff in this cause to have only union labor or to discharge any employees so as to employ union labor, but that we were only insisting that the company fulfil its contractual obligations and that the City require the company to fulfil said obligations in that it pay the prevailing wage in the Atlanta area. On May 31, 1961, Mr. J. C. Savage, City Attorney, wrote a letter to Mr. Ray Nixon, Chief of Construction, said letter being written in his capacity as City Attorney.

[fol. 24] A hearing was held before the Board of Aldermen, and said Board did not make a determination that the plaintiff herein was paying the prevailing wage, but they reached the following conclusion:

> "After a lengthy discussion this matter was referred to executive session where the Committee agreed that there is nothing that the City can legally do so as to make Curry raise his pay scale."

Both jobs in the construction industry and more particularly jobs that are built by the City of Atlanta are given to contractors on competitive bids with the lowest bidder receiving the job. S. J. Curry & Company was enabled to be the lowest bidder in this cause by its determination that it would not live up to the terms of the contract which it executed with the City of Atlanta, and only by the payment of depressed wages which utterly destroy the wage structure in the Atlanta, Georgia, area. The effect of a failure to pay the prevailing wages by a contractor such as the plaintiff is that the company paying the depressed wages receive the job because they make the lowest bid, and those companies which desire to maintain the wage scale therefore are faced with the problem of either ceasing to remain in business because they will not successfully bid or of themselves paying lower wages so as to meet the competition. It is, therefore, utterly destructive to the wage structure in this area for a company such as plaintiff to pay less wages which are substantially less than the prevailing wage scale in the Atlanta, Georgia, area. This is a matter of the utmost concern to all of the building trades crafts.

There has been no attempt to my knowledge to require the plaintiff to in any way violate the State's Right to [fol. 25] Work Laws or any other statutes or laws of the State of Georgia, but the only attempt which has been made has been to require the plaintiff to live up to its contractual obligations with the City of Atlanta and to pay the prevailing wage as it had contracted to do.

Construction and General Laborers Local Union No. 438, as a result of the failure of its elected representatives, the City of Atlanta, to enforce the contractual provision placed in the contract for the benefit of the members of said union as well as the other building trades crafts and as citizens of the City of Atlanta determine to publicize the fact that said contract provision incorporated in the contract by its own elected representatives, the officials of the City of Atlanta, was not being enforced, and to publicize the fact that construction was being engaged in in violation of the contract with the City of Atlanta and to the detriment of the citizens of the City of Atlanta by the plaintiff in this cause through the payment by plaintiff in this cause of wages destructive of the wage structure in the Atlanta, Georgia, area. It was to publicize this fact and only to publicize this fact that the picket line was erected at the plaintiff's construction work of the South River Sewage Disposal Plant in the City of Atlanta, Georgia. The picketing has at all times been peaceful and has consisted merely the publicizing to the public of facts relating to the actions of the elected representatives of the public and of the people engaging in the picketing and to publicize the fact that jobs being paid for out of the tax money of those picketing and other citizens of the City of Atlanta was being done with the company depressing the wage structure and standard of living in the Atlanta, Georgia, area.

[fol. 26] The above statement is given for the purpose of being used as evidence in the above styled case.

/s/ J. O. Moore

Sworn to and subscribed before me
this 12 day of September, 1961.

/s/ Mary L. Lester
Notary Public

[fol. 27]

EXHIBIT F TO BILL OF EXCEPTIONS

FULTON SUPERIOR COURT

Case No. A-88617

S. J. CURRY & COMPANY

vs.

LOCAL NO. 438 CONSTRUCTION & GENERAL LABORERS UNION, AFL-CIO

AFFIDAVIT OF WILLIAM WILSON

STATE OF GEORGIA,
COUNTY OF FULTON.

I, WILLIAM WILSON, being first duly sworn, do solemnly make oath as follows:

My name is William Wilson. I am Business Agent of Construction & General Laborers Union No. 438. I am a member of the Atlanta Buildings Trades Council, and as such have knowledge not only as to the prevailing wage in the Atlanta, Georgia, area for construction and general laborers, but also for other crafts in the Atlanta Building Trades Council. As such I have personal knowledge of the following:

I know of my personal knowledge that Arthur Pew Construction Company, Inc., of Atlanta, Georgia, has engaged in the following construction in the Atlanta, Georgia, area subsequent to July, 1959: watermain construction at Atlanta, Georgia, on Bolton Road, watermain construction at Atlanta, Georgia, on Bolton Road, watermain construction in DeKalb County, Georgia, watermain construction, Atlanta, Georgia, on Moores Mill Road, water treatment plant in Atlanta, Georgia, on Bolton Road, sewer line construction in DeKalb County, Georgia, on the South River and sewage treatment plant at Kennesaw, Georgia.

During said period all carpenters on said jobs were paid at the following rate: July 1, 1959, to January 1, 1960, $3.20; January 1, 1960, to July 1, 1960, $3.25; July 1, 1960, to the present $3.35.

[fol. 28] In the year 1960 G. E. Tillman Company, Inc., constructed a sewage treatment plant known as Sewage Treatment Plant Improvements Contract B, Atlanta, Georgia. In said construction the company employed six operating engineers who were paid $3.67½ per hour, four carpenters who were paid $3.35 an hour, ten iron workers who were paid $3.60 an hour, twelve plumbers and pipe fitters who were paid $3.85 an hour, and fifty laborers who were paid $2.00 an hour, and eight brickmasons who were paid $4.00 an hour.

A company known as Halpin, Inc., Avondale Estates, Georgia, engaged in construction of a sewage disposal plant in DeKalb County, Georgia, said construction being during the year 1959, and on said job the following wages were paid: carpenters, $3.35 per hour; cement finishers, $3.30 an hour; operators $3.67½ per hour; oilers $2.57½ per hour, bricklayers $4.00 an hour, laborers $2.00 an hour.

P. D. Christian Company, of Atlanta, Georgia, have since July 1, 1960, paid $3.35 to all carpenters; Gowdy & Durkin, Inc., is paying on the South River Sewage treatment plant, Atlanta, Georgia $4.00 per hour to plumbers and steam fitters; C. L. Gerlach Electric Company is paying to electricians, foremen $4.35 per hour, journey men $4.00 an hour, apprentice third year $2.40 an hour; apprentice second six months $1.95 an hour.

The above wages conform to the wage scale as approved under the Davis-Baker Act.

The plaintiff in this cause executed a contract with the City of Atlanta for construction of the South River sewage disposal plant, which contract contained the following language:

> "Wages will conform with those being paid on similar types of work in the Atlanta area."

Notwithstanding said agreement which the plaintiff entered into with the City of Atlanta, the plaintiff has never paid the prevailing wage rates in the Atlanta, Georgia,

area, said rates being those hereinabove set out, but has [fol. 29] always paid substantially less than the wages prevailing in this area. We have made repeated attempts to prevail upon said company to pay the prevailing wage, but all to no avail. It has been our insistence that they pay the prevailing wage and not that they only employ union personnel, and we have not in anyway violated the State's Right to Work Laws or any other section of any of the statutes of the State of Georgia. The Construction and General Laborers Union has a substantial interest in whether or not the prevailing wage is paid in this area. The plaintiff was a low bidder on this job, and those companies that have paid the prevailing wage were unsuccessful in their bids because of the fact that they were maintaining the standard of living in the Atlanta, Georgia, area. This Albany, Georgia, company, by paying depressed wages, is putting the companies desiring to maintain the wage scale in this area in the unfortunate position of having to reduce their wage scale or else fail to secure the bids necessary to remain in business. As citizens of the City of Atlanta, we decided that we had a right and duty to inform the public of what our and their elected representatives were doing in that they were not enforcing provisions of their contract with the plaintiff, which provisions were placed in that contract for the benefit of the people whom we represent and which were placed in the contract to maintain the wage scale and the standard of living of the citizens of the City of Atlanta. We, therefore, have directed a peaceful picket line for the purpose of advertising the true facts of the situation.

The above statement is given for the purpose of being used as evidence in the above styled case.

/s/ William Wilson

Sworn to and subscribed before me,
this 11th day of September, 1961.

/s/ John S. Patton
Notary Public,

(Seal)

[fol. 30]

EXHIBIT G TO BILL OF EXCEPTIONS

IN THE SUPERIOR COURT OF FULTON COUNTY

Case No. A 88617

S. J. CURRY AND COMPANY, a Partnership Composed of S. J. CURRY, C. D. McKNIGHT, JR., E. G. HIGHTOWER and J. E. TAPPAN

vs.

LOCAL UNION #438, CONSTRUCTION AND GENERAL LABORER'S UNION, AFL-CIO

AFFIDAVIT OF P. D. CHRISTIAN, JR.

STATE OF
COUNTY OF

I, P. D. CHRISTIAN, JR., being first duly sworn, do solemnly make oath as follows:

My name is P. D. Christian, Jr. I am president of P. D. Christian Company with offices at 3130 Maple Drive, N. E., Atlanta 5, Georgia. In all of our construction work in this area we are paying journeyman carpenters at the rate of $3.35 per hour and have done so since July 1, 1960.

The above statement is given for the purpose of being used as evidence in the above styled case.

P. D. CHRISTIAN COMPANY

/s/ P. D. CHRISTIAN, JR.
P. D. Christian, Jr., President

Sworn to and subscribed before me
this 7 day of Sept. 1961.

Evelyn Titus, Notary Public

/s/ EVELYN TITUS
Evelyn Titus, Notary Public
My Commission Expires 8/1/64

[fol. 31]

EXHIBIT H TO BILL OF EXCEPTIONS

IN THE SUPERIOR COURT OF FULTON COUNTY

Case No. A-88617

S. J. CURRY AND COMPANY, a Partnership Composed of S. J. CURRY, C. D. McKNIGHT, JR., E. G. HIGHTOWER and J. E. TAPPAN

vs.

LOCAL UNION #438, CONSTRUCTION AND GENERAL LABORER'S UNION, AFL-CIO

AFFIDAVIT OF JAMES H. KAMINER

STATE OF
COUNTY

I, JAMES H. KAMINER, being first duly sworn, do solemnly make oath as follows:

I am associated in the construction business as an official thereof, of Kaminer Construction Corporation. On our construction contracts at Marietta, Cobb County, Georgia, between the periods indicated, this company paid the hourly carpenter rates shown below:

Job	*Period*	*Hourly Wage*
Lockheed Fueling Job Cobb County, Marietta	11/17/58 to 13/31/58	$3.05
Water Treatment Plant	7/25/57 to 6/18/58	2.95

The above statement is given for the purpose of being used as evidence in the above styled case.

/s/ JAMES H. KAMINER

Sworn to and subscribed before me
this 8th day of Sept., 1961.

/s/ W. B. McDONALD
Notary Public, Georgia State at Large
My Commission Expires Feb. 18, 1962

[fol. 32]

EXHIBIT I TO BILL OF EXCEPTIONS

IN THE SUPERIOR COURT OF FULTON COUNTY

Case No. A 88617

S. J. CURRY AND COMPANY, a Partnership Composed of S. J. CURRY, C. D. McKNIGHT, JR., E. G. HIGHTOWER and J. E. TAPPAN

vs.

LOCAL UNION #438, CONSTRUCTION AND GENERAL LABORER'S UNION, AFL-CIO

STATEMENT OF WILLIAM OWEN THOMAS

STATE OF
COUNTY OF

I, WILLIAM OWEN THOMAS, being first duly sworn, do solemnly make oath as follows:

My name is William Owen Thomas. I am associated with Arthur Pew Construction Company, Inc. general contractors with offices in Chamblee, Georgia. Arthur Pew Construction Company, Inc. is engaged in construction of the Chattahoochee Water Treatment Plant between the dates of about the 25th day of November, 1957 and the 11th day of October, 1960 and throughout the period of said construction, the hourly rate paid to carpenters was as follows:

July 1, 1957	$2.95
July 1, 1958	3.05
July 1, 1959	3.20
January 1, 1959	3.10
January 1, 1960	3.25
July 1, 1960	3.35
July 1, 1961	3.45

The wages we have paid are the prevailing wages for this type of construction in this area.

The above statement is given for the purpose of being used as evidence in the above styled case.

/s/ William Owen Thomas

Sworn to and subscribed before me
this 8 day of Sept., 1961

/s/ Van A. Braud
Notary Public, Fulton County, Georgia

[fol. 33]

Exhibit J to Bill of Exceptions

In the Superior Court of Fulton County

Case No. A 88617

S. J. Curry and Company, a Partnership Composed of S. J. Curry, C. D. McKnight, Jr., E. G. Hightower and J. E. Tappan

vs.

Local Union #438, Construction and General Laborer's Union, AFL-CIO

Affidavit of Kenneth E. Goodwin

State of
County of

I, Kenneth E. Goodwin, being first duly sworn, do solemnly make oath as follows:

My name is Kenneth E. Goodwin. I am a superintendent of construction for Halpin, Inc., whose principal office is located in Toledo, Ohio.

Beginning about the first day of June 1960 and ending about the first day of June 1961, Halpin, Inc. was engaged in construction of a sewage disposal plant for the County of DeKalb, Georgia. During the entire period of said construction, Halpin, Inc. paid the following wages to its employees.

Craft	*Hourly Wage*
Carpenters	3.35
Cement Finishers	3.30
Operators	3.675
Oilers	2.575
Bricklayers	4.00
Laborers	2.00

The above statement is given for the purpose of being used as evidence in the above styled case.

/s/ KENNETH E. GOODWIN

Sworn to and subscribed before me
this the 5th day of Sept., 1961.

/s/ MARYON BARON
Notary Public, State of Florida at Large

My Commission Expires Feb. 22, 1963
Bonded by American Surety Co. of N. Y.

[fol. 34]

IN THE SUPERIOR COURT OF FULTON COUNTY, GEORGIA

JUDGE'S CERTIFICATE TO BILL OF EXCEPTIONS

GEORGIA,
FULTON COUNTY:

I do certify that the foregoing Bill of Exceptions, together with the affidavits attached thereto and made a part thereof and marked Exhibit A, B, C, D, E, F, G, H, I and J, are true and specifies all of the evidence, and specifies all of the record, material to a clear understanding of the error complained of; and the Clerk of the Superior Court of Fulton County is hereby ordered to make out a complete copy of such parts of the record in said case as are in this Bill of Exceptions specified and certify the same as such and cause the same to be transmitted to the Supreme Court of Georgia, that the errors alleged to have been committed may be considered and corrected.

This the 10th day of October, 1961.

Ralph H. Pharr, Judge, Fulton Superior Court.

Acknowledgment of service (omitted in printing).

[fol. 35] [File endorsement omitted]

[fol. 36] Clerk's certificate to bill of exceptions (omitted in printing).

[fol. 37] [File endorsement omitted]

[fol. 39]

IN THE SUPERIOR COURT OF FULTON COUNTY, GEORGIA

A-88617

PETITION—Filed August 24, 1961

To the Superior Court of Said State and County and the Honorable Claude D. Shaw, Judge Thereof:

The petition of S. J. Curry, C. D. McKnight, Jr., E. G. Hightower and J. E. Tappan, doing business as a partnership under the name and style of S. J. Curry & Company, respectfully shows:

1.

The defendant is Local No. 438 of the Construction and General Laborers Union—AFL CIO, an unincorporated association within the meaning of Title Three, Section 118, Code of Georgia Annotated, 1960 Supplement. The defendant maintains its principal office at 1014 Edgewood Avenue, N. E., Atlanta, Fulton County, Georgia, and is engaged in representing its members, conducting picketing and otherwise doing business in Fulton County, Georgia.

2.

The petitioners are engaged in the business of a general contractor within the State of Georgia and perform various kinds of construction work.

3.

This court has jurisdiction over the defendant.

4.

On November 15, 1960 the petitioners entered into a contract with the City of Atlanta for the construction of certain additions and improvements to the sewage disposal facilities located at the South River Sewage Treatment Plant in the City of Atlanta. This contract was let by the City of Atlanta under the specific contract title of "Construct Sewage Treatment Plant Improvements, South River Plant: Contract D." Under the terms of said contract the petitioners were to undertake the construction of designated improvements and additions to the existing sewage disposal plant as a general contractor and the petitioners agreed, [fol. 40] pursuant to the terms of the contract, to complete the same within 540 consecutive calendar days from the date of the notice to proceed, December 5, 1960.

5.

In undertaking the construction and completion of the improvements and additions contemplated under their contract, the petitioners have engaged the services of varying numbers of workers engaged in certain of the building and construction crafts, such as carpenters, iron workers, brick masons, cement finishers, common laborers and the like.

6.

Petitioners further show that in the construction and completion of the aforementioned facilities, they operate what is known in the trade as an "Open Shop" as required by the laws of the State of Georgia, hereinafter set forth, and to this extent petitioners permit workers engaged in said construction project to be employed thereon without any discrimination as to whether such workers are or are not members of a labor organization.

7.

While petitioners have been awarded the general contract for the construction work involved, the City of Atlanta has subcontracted directly with other contractors to complete the electrical and plumbing work connected with said proj-

ect. All electrical work connected with the construction project has been subcontracted by the City of Atlanta to C. L. Gerlach Electric Company, of Fulton County, Georgia, and all plumbing work has been subcontracted by the City of Atlanta to Gowdy & Durkin, Inc., of Fulton County, Georgia. Your petitioners have no control or supervision over the work of the aforementioned contractors as their contracts are directly with the City of Atlanta.

[fol. 41] 8.

On or about August 10, 1961 the defendant, acting by and through its business agent, W. M. Wilson, and other persons whose names are unknown to petitioners, caused a man or picket to appear in front of the construction project of petitioners at the South River Sewage Treatment Plant and have caused said picket to patrol or picket the main entrance to said construction project from August 10, 1961 through the present time. The aforementioned picket has been actively engaged in the picketing of petitioners' construction project by walking up and down in front of the main entrance to said construction site, which is located at the intersection of South River Industrial Boulevard and Forest Park Road, carrying a picket sign bearing the following legend:

"S. J. Curry & Co., Inc. violating contract with City of Atlanta by not paying wages conforming with those of a similar type of work in the Atlanta area.

CONSTRUCTION AND GENERAL LABORERS UNION
438 AFL CIO."

9.

As a direct result of the picketing or patrolling caused by the defendant through its agents, the employees of C. L. Gerlach Electric Company and Gowdy & Durkin, Inc. have walked off the construction site and have refused, and still refuse, to continue their work. In addition, the presence of the picket has created a conditon so that carriers and suppliers have been prevented from supplying or delivering materials to the construction site of petitioners because of

the refusal and failure of truck drivers to cross the aforementioned picket line.

10.

The refusal of other contractors' employees to work on the construction site in question coupled with the effective prevention of the delivery of materials and supplies as aforesaid, has placed petitioners in a position so that they are unable to satisfactorily complete and perform their con- [fol. 42] tract with the City of Atlanta, thus depriving petitioners from lawfully engaging or continuing to engage in the proper and lawful pursuit of their business; and, further, many of petitioners' own employees have been deprived of the right to work because of the work stoppage resulting from the aforementioned conditions.

11.

The placing of a picket in front of a construction site or job such as petitioners is a commonly accepted and established sign or signal used by construction craft unions to notify all union workers that a particular job has been declared "unfair" or placed "on strike" so that they will refuse to work on that particular construction job. The purpose of such picket line is to compel such union members working on the job to refrain from working, thereby bringing effective economic and coercive pressure upon petitioners and all of petitioners' employees who do not belong to such craft unions.

12.

As aforesaid, many of the employees employed by petitioners have no union affiliation, but because the work on this construction project is so integrated, many workers or employees who are willing to continue to perform their duties, notwithstanding the presence of the picket line, cannot proceed in an orderly manner unless the work performed by craft union workers and the delivery of materials and supplies also proceeds. Due to this integration of work, the picket line established by the defendant has resulted in a partial cessation of vital work on the improvements

that petitioners have contracted with the City of Atlanta to complete at the South River Sewage Treatment Plant, and if the picketing is allowed to continue, in a short time there will be almost a complete stoppage of work.

13.

Because of the facts hereinbefore set out, the petitioners are unable to proceed with and continue the work remaining to be done on said construction project and the peti- [fol. 43] tioners will thereby be unable to proceed with full performance of its contract with the City of Atlanta; and unless the aforementioned picketing and patrolling are immediately discontinued, your petitioners will be unable to complete the construction contemplated under their contract with the City of Atlanta within the 540 days allowed under the contract, and thereby invoking the penalty provisions of said contract.

14.

The petitioners have no dispute of any kind with any of their employees or with any labor organization representing their employees.

15.

The picketing described herein constitutes an unlawful interference with the employment of certain of petitioners' employees and also constitutes an unlawful interference with petitioners' business. By its above described conduct, the defendant is preventing and attempting to prevent the petitioners from lawfully engaging or continuing to engage in the proper, lawful and peaceful use and enjoyment of their property used in the conduct of their respective business and through its act the defendant is further actively interfering with the pursuit of lawful employment by certain of petitioners' employees.

16.

The defendant is conducting the said picketing in a manner calculated to interfere with petitioners' contract with

the City of Atlanta so as to make performance of this contract impossible and thereby the petitioners are suffering irreparable and incalculable injury and damage and your petitioners will continue to suffer irreparable damage so long as the unlawful picket line is allowed to be maintained by the defendant or any of its agents.

17.

Petitioners further show the court that the defendant is well aware that union members are under compulsion and coercion to refrain from crossing the picket line or working [fol. 44] on any site behind the picket line and further that the defendant is well aware that the establishment of the picket line in front of petitioners' job site would necessarily result in a serious disruption and eventual complete cessation of work.

18.

Petitioners further show the court that they are informed and believe, and so charge, that the conduct and acts of the defendant as herein set out are all a part of a concerted plan to bring economic and coercive pressure to bear upon petitioners so as to require petitioners to abandon the operation of an "open shop" on the aforementioned construction site and further to force petitioners into the unlawful status of requiring union membership as a condition of employment on said construction site, both of which are clear violations of the laws of this State as shall be hereinafter set forth.

19.

Petitioners have no adequate remedy at law.

20.

The aforementioned acts of the defendant are in direct violation of the following laws of the State of Georgia:

"Georgia Code (Ann. Supp.) Section 54-804,

Compelling persons to join, or refrain from joining, labor organization, or to strike or refrain from strik-

ing.—It shall be unlawful for any person acting alone or in concert with one or more other persons to compel or attempt to compel any person to join or refrain from joining any labor organization, or to strike or refrain from striking against his will by any threatened or actual interference with his person, immediate family, or physical property, or by any threatened or actual interference with the pursuit of lawful employment by such person, or by his immediate family."

[fol. 45] "Georgia Code (Ann. Supp.), Section 54-805,

Unlawful interference with employer's business.—It shall be unlawful for any person, acting alone or in concert with one or more other persons, by the use of force, intimidation, violence, or threats thereof, to prevent or attempt to prevent any employer from lawfully engaging or continuing to engage in any proper and lawful business activity, or from the proper, lawful or peaceable use or enjoyment of his property used or useful in the conduct of such business, or from acquiring materials or supplies for the purposes of such business, or from disposing of the goods, wares or products of such business, or to prevent or attempt to prevent any carrier or other person from supplying or delivering materials or supplies to any such employer, or from receiving or accepting delivery on the premises of such business of the goods, wares or products of such business."

"Georgia Code Section 66-9906. *Unlawfully preventing laborers, etc., from performing duties.*—

Any person or persons, who, by threats, violence, intimidation, or other unlawful means, shall prevent or attempt to prevent any person or persons from engaging in, remaining in, or performing the business, labor, or duties of any lawful employment occupation, shall be guilty of a misdemeanor."

21.

Petitioners further show the court that they have an absolute property right in the use and enjoyment of their prop-

erty, which includes the carrying on of their business activities related to the construction of the additions and improvements to the South River Sewage Treatment Plant and in using their materials and equipment in relation thereto, and that the defendant has and is effectively interfering with the enjoyment of this property right.

[fol. 46] 22.

Petitioners further show that the harassment and unlawful picketing conducted by the defendant has not only interfered with its own property right but, as aforesaid, it has interfered with the right to work guaranteed under the laws of this State to petitioners' employees who are innocent of any wrongdoing and desire to continue their employment without interruption but cannot do so due to the integrated nature of the construction business; and petitioners further show that the harassment and unlawful picketing as aforesaid will continue unless the defendant is temporarily and permanently enjoined from molesting the petitioners in the lawful pursuit of their business and from interfering with the employment rights of petitioners' employees.

23.

Petitioners emphatically aver that they are not engaged in any labor dispute with any of their own employees or with any labor organization representing their employees.

Wherefore, your petitioners pray as follows:

(a) That process issue directed to the defendant requiring it to be and appear before this court to answer this petition as required by law;

(b) That forthwith, and pending further hearing, and until further order of this court, the defendant and all persons acting in association or connection with the defendant be restrained and enjoined from picketing or causing the picketing of the construction job of the petitioners; and restrained from taking any action either directly or in-

directly which has the effect of causing work stoppage and disruption on, or interference with, petitioners' construction project in building the additions and improvements at the South River Sewage Treatment Plant; and restrained from coercing, hindering or obstructing petitioners' employees in carrying out their assigned duties on petitioners' [fol. 47] construction project; or from inducing or attempting to induce any employee to cease work or refrain from working on said construction job; and that after due hearing, the defendant and all of its officers, agents, members and servants be temporarily and permanently enjoined as aforesaid.

(c) That a rule nisi issue, directed to the defendant, to show cause before this court and Honorable Judge on a day certain why it should not be enjoined and restrained as herein prayed; and that pending a hearing on said rule nisi the defendant be temporarily restrained and enjoined as herein prayed;

(d) That the petitioners have such other and further relief as this court may deem proper.

Perry, Walters & Langstaff, By: Robert. B. Langstaff, Attorneys for Petitioners.

[fol. 48] *Duly sworn to by S. J. Curry, jurat omitted in printing.*

[fol. 49]

IN THE SUPERIOR COURT OF FULTON COUNTY, GEORGIA

ORDER TO SHOW CAUSE—August 24, 1961

The within and foregoing petition having been read and considered, It Is Ordered Filed. Let a copy of the same together with this order and process, be served upon the defendant as provided by law.

It Is Ordered that the defendant show cause before this Court on the 12 day of Sept., 1961 at 9:45 o'clock A. M., in the Fulton County Courthouse, why the prayers of this petition should not be granted and why it should not be enjoined as prayed.

This the 24 day of August, 1961.

Claude D. Shaw, Judge, Superior Court, Fulton County.

[fol. 50]

IN THE SUPERIOR COURT OF FULTON COUNTY, GEORGIA

STATE OF GEORGIA,
COUNTY OF FULTON,

Complaint A-88617

S. J. CURRY, C. D. McKNIGHT, JR., E. G. HIGHTOWER, and J. E. TAPPAN, d/b/a S. J. CURRY & COMPANY,

versus

LOCAL NO. 438 of the CONSTRUCTION AND GENERAL LABORERS UNION—AFL CIO

SUMMONS—August 24, 1961

To the Sheriff or His Deputy, of said County, Greeting:

The Defendant herein is hereby required, personally or by attorney, to be and appear at the Superior Court, to be held in and for said County within 30 days from the date of service of the within petition, upon each Defendant, as shown by entry of serving officer set forth below, then and there to answer in writing the Plaintiff's Complaint, as in default thereof said court will proceed, as to justice shall appertain.

Witness, the Honorable Virlyn B. Moore, Judge of said Court,

This 24th day of August, 1961.

Ruby H. Ward, Deputy Clerk.

Filed in Office this the 24th day of August 1961.

Ruby H. Ward, Deputy Clerk.

[fol. 51]

IN THE SUPERIOR COURT OF FULTON COUNTY, GEORGIA

ORDER DENYING INTERLOCUTORY INJUNCTION
—September 12, 1961

This cause came on this day to be heard upon the pleadings in the cause, affidavits, oral testimony and argument of counsel from all of which it appearing that the applications for temporary Interlocutory Injunction should be denied and is so denied.

This Sept. 12, 1961.

Ralph H. Pharr, Judge, Superior Court, Atlanta Judicial Circuit

[fol. 52] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 53]

IN THE SUPREME COURT OF GEORGIA

Case No. 21463

CURRY et al.

v.

CONSTRUCTION & GENERAL LABORERS UNION LOCAL NO. 438, AFL-CIO.

OPINION—Decided January 4, 1962

By the Court:

While the picketing in the present case was peaceful, it was for an unlawful purpose, and should have been restrained and enjoined.

HEAD, Presiding Justice. S. J. Curry and others, doing business as a partnership under the name of S. J. Curry & Company, brought a petition for injunction against Local

No. 438, of the Construction and General Laborers Union —AFL CIO. The trial judge refused to grant the interlocutory injunction, and the exception is to this order.

On November 15, 1960, the petitioners entered into a contract with the City of Atlanta for the construction of certain improvements to sewage disposal facilities of the city. The contract has a limitation of 540 days from December 5, 1960, with a penalty provision for each day beyond the limit in which the work is not completed. The petitioners operate on what is known as an "open shop" basis, that is, they employ workmen without regard to whether or not they are members of a labor organization. The petitioners were awarded only the general contract for the construction work. The city subcontracted directly with [fol. 54] other contractors for the electrical and plumbing work connected with the project, and the petitioners have no supervision over the work of these contractors. Shortly after the petitioners started on their construction work, they were visited by representatives of various local labor unions in the Atlanta area, and a conference was arranged on February 14, 1961. The representatives of the labor unions requested that the petitioners use union workmen on the job. S. J. Curry, in his affidavit, stated that, when he told the union representatives present that the petitioners would not use union members exclusively, since they operate on an "open shop" basis, he was told by Mr. Moore (a representative of the Building Trades Council of Atlanta) and "other representatives of the unions" that "they would use every means at their command to see that we did use union workmen on our project." On August 10, 1961, a picket was placed by the defendant at the main entrance of the construction site of the petitioners, carrying a placard with the following legend: S. J. Curry & Company, Inc. violating contract with City of Atlanta by not paying wages conforming with those of a similar type of work in the Atlanta area. CONSTRUCTION AND GENERAL LABORERS UNION 438 AFL CIO." The picket has patrolled the construction site since that time, and because of the picket, the employees of the electrical and plumbing contractors have refused to continue their work, and carriers and suppliers have refused to deliver material and sup-

plies. This has resulted in a partial cessation of the work, since the construction can not proceed without electrical and plumbing work and the delivery of essential supplies. The consequence of the partial cessation of work has been the discharge of all but 37 of the 72 men working on the job at the time the picket was established.

[fol. 55] The contract of the petitioners with the city contains the following language: "Wages will conform with those being paid on similar types of work in the Atlanta area." The evidence introduced for the defendant showed that the petitioners were not paying their employees the wage scale of specified construction contractors in the Atlanta area. James Moore, in his affidavit, stated that he had attempted to persuade the petitioners to comply with their contract with the city in regard to the payment of wages, and had conferred with officials of the city in an effort to have them require the petitioners to comply with their contract, but had been unsuccessful in both attempts.

"Peaceful picketing is not unlawful, unless it is for an illegal purpose. On the contrary, it is authorized under the constitutional guarantee of free speech." Cook v. Huckaboo Transport Corp., 215 Ga. 9, 13 (109 SE2d 740). The picketing in the present case was peaceful. The trial judge was authorized to find from the evidence that the petitioners were not paying wages conforming with those paid on similar types of work in the Atlanta area. It is asserted by the defendant that it has a right to use the method of picketing to inform the public of the petitioners' failure to abide by the terms of their contract with the City of Atlanta, that it is a matter of legitimate concern to the defendant that the wages paid by the petitioners are lower than those paid on similar types of work in the area, since contracts are ordinarily let on competitive bids and a company paying lower wages can underbid contractors paying union wages.

It is asserted in the petition, and shown by undisputed evidence of the petitioners that the establishment of a picket by a labor union (whatever placard the picket may [fol. 56] carry) is a signal to all members of the labor unions to refuse to work on the job, or to furnish supplies for it, and this fact was known to the defendant. The peti-

tioners have no labor dispute with their employees, and the defendant is not representing employees of the petitioner. The defendant has chosen to use a method of imparting information to the public which it knew would have the effect of paralyzing the petitioners' operations, preventing them from completing their contract within the time limit provided by its terms, and forcing them to discharge a number of their employees.

The facts of the present case are similar to those in Powers v. Courson, 213 Ga. 20 (1) (96 SE2d 577), in which it was held: "The decision of this court in Woodard v. Collier, 210 Ga. 239 (78 SE2d 526), is controlling in the instant case. Here, as in that case, the evidence demands a finding that the picket was placed on the job for the purpose of forcing Powers to employ only union labor, or be unable to comply with the terms of his contract because of the refusal of the members of other unions employed in the work to cross the picket line, and thereby slow the project to a virtual standstill. As held in that case, such picketing is for an unlawful purpose, and clearly a violation of the provisions of Code Ann. Supp. § 54-804, and Code § 66-9906. See also Local Union No. 10, United Association of Journeymen Plumbers & Steamfitters v. Graham, 345 U. S. 192 (73 Sup. Ct. 585, 97 L. ed. 946); Ellis v. Parks, 212 Ga. 540 (93 SE2d 708)."[3]

The trial judge erred in refusing the interlocutory injunction.

Judgment reversed. All the Justices concur.

[fol. 57] 21463

IN THE SUPREME COURT OF GEORGIA

ATLANTA

S. J. CURRY et al.

v.

CONSTRUCTION & GENERAL LABORERS UNION
LOCAL NO. 438, AFL-CIO

JUDGMENT—January 4, 1962

This case came before this court upon a writ of error from the Superior Court of Fulton County; and, after argument had, it is considered and adjudged that the judgment of the court below be reversed because the court erred in refusing the interlocutory injunction. All the Justices concur.

Bill of Costs, $15.00

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE, ATLANTA

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia, and that

paid the above bill of costs.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk

[fol. 58] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 59]

SUPREME COURT OF THE UNITED STATES

No. 839, October Term, 1961

LOCAL NO. 438, CONSTRUCTION & GENERAL LABORERS' UNION, AFL-CIO, Petitioner,

vs.

S. J. CURRY et al., etc.

ORDER ALLOWING CERTIORARI—May 21, 1962

The petition herein for a writ of certiorari to the Supreme Court of the State of Georgia is granted limited to the question of whether the Supreme Court erred as stated in Questions (d), (h) and (i) of the petition which read as follows:

"(d) In holding that it was illegal for the Petitioner to carry a placard in front of the Construction job containing the statement 'S. J. Curry & Company, Inc., violating contract with City of Atlanta by not paying wages conforming with those of a similar type of work in the Atlanta area: Construction & General Laborers' Union 438, AFL-CIO'. The Court so held, notwithstanding the fact that the Court found that the legend carried upon said sign was true and that S. J. Curry & Company was not paying the prevailing wage in the area even though it had executed a contract with the City of Atlanta for said construction which contract contained the provision: 'Wages will conform with those being paid on similar types of work in the Atlanta area'.

"(h) In granting said injunction, said court deprived Petitioner in Certiorari of rights protected by the National [fol. 60] Labor Relations Act, Title 29, Section 157 of the United States Code Annotated.

"(i) In granting said injunction said court assumes jurisdiction of a cause, the subject matter of which had

been pre-empted by enactment of the National Labor Relations Act, Title 29, Section 157-158(b) of the United States Code Annotated."

Counsel are requested also to brief and argue the question of the Court's jurisdiction to review the judgment of the Supreme Court of Georgia under 28 U.S.C. § 1257; see Montgomery Building & Construction Trades Council v. Redbetter Erection Company, 344 U.S. 178.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Frankfurter took no part in the consideration or decision of this application.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
APR 3 1962
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

LOCAL NO. 435 CONSTRUCTION & GENERAL LABORERS' UNION, AFL - CIO,

VS. CASE NO. [redacted]87

S. J. CURRY, C. D. McKNIGHT, JR., E. G. HIGHTOWER and J. M. TAPPAN, DOING BUSINESS AS S. J. CURRY & COMPANY, A PARTNERSHIP.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

EDWIN PEARCE,
JOHN S. PATTON,

ATTORNEYS FOR PETITIONER IN CERTIORARI.

POOLE, PEARCE & HALL,
1642 Bank of Georgia Building,
Atlanta 3, Georgia.

COMMERCIAL RECORDER, FORT WORTH, TEXAS—4-2-62—80

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IN THE

SUPREME COURT OF THE UNITED STATES

LOCAL NO. 438 CONSTRUCTION & GENERAL LABORERS' UNION, AFL - CIO,

VS. CASE NO. .....

S. J. CURRY, C. D. McKNIGHT, JR., E. G. HIGHTOWER and J. E. TAPPAN, DOING BUSINESS AS S. J. CURRY & COMPANY, A PARTNERSHIP.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE STATE OF GEORGIA

TO THE HONORABLE EARL WARREN, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF SAID COURT:

The petition of Local No. 438 Construction & General Laborers' Union, AFL - CIO, affiliated with Hod Carriers' Building & Common Laborers' Union of America, AFL - CIO, for the issuance of a Writ of Certiorari by the Supreme Court of the United States to review a decision and judgment rendered by the Supreme Court of the State of Georgia, respectfully shows:

1. Petitioner was the Defendant in Error in the Supreme Court of the State of Georgia in the case styled S. J. Curry, C. D. McKnight, Jr., E. G. Hightower and J. E. Tappan, doing business as S. J. Curry & Company, a partnership, vs. Local 438, Construction & General Laborers' Union, AFL - CIO, case No. 21463. A decision adverse to your Petitioner was rendered by the said Court. The said decision is officially reported in 123 S.E., 2d 653.

2. The said decision was rendered by the Supreme Court of the State of Georgia on the 4th day of January, 1962. Judgment was entered by decree reversing the decision of the Superior Court of Fulton County, Georgia, on January 4th 1962.

3. Jurisdiction of this Court to review the judgment of the Supreme Court of Georgia by Writ of Certiorari is vested in this Court under 62 Stat., ~~922~~ 925 (3), 28 U.S.C.A. 1257(3).

4. The Supreme Court of the State of Georgia overruled the decision of the Superior Court of Fulton County, Georgia, and sustained the prayer of the Defendant herein and granted a temporary injunction against Petitioner, restraining Defendant herein, S. J. Curry & Company. (Exhibit 1 to this Petition.)

QUESTIONS PRESENTED FOR REVIEW

This Court is asked to review the judgment of the Supreme Court of the State of Georgia and to deter-

mine if the Supreme Court of the State of Georgia erred in the following particulars:

(a) In holding that while the picketing engaged in by the Petitioner was peaceful it was for an unlawful purpose and should have been restrained and enjoined.

(b) In finding that the evidence demanded a finding that the pickets were placed on the job for the purpose of forcing a violation of the State's Right To Work Law.

(c) In holding the picketing was for an unlawful purpose and clearly a violation of the provisions of Georgia Code Section 54-804 and Code Section 66-9906.

(d) In holding that it was illegal for the Petitioner to carry a placard in front of the construction job containing the statement: "S. J. Curry & Company, Inc., violating contract with City of Atlanta by not paying wages conforming with those of a similar type of work in the Atlanta area. Construction & General Laborers' Union 438, AFL - CIO". The Court so held, notwithstanding the fact that the Court found that the legend carried upon said sign was true and that S. J. Curry & Company was not paying the prevailing wage in the area even though it had executed a contract with the City of Atlanta for said construction which contract contained the provision:

"Wages will conform with those being paid on similar types of work in the Atlanta area".

(e) In holding it unlawful for the Petitioner to publicize by means of peaceful picketing the fact that its own elected City Officials were not enforcing a contractual provision on a construction project being erected with their own tax money, the contractual provision being placed in the contract for the benefit of all labor including those carrying said placard.

(f) In holding that the Superior Court of Fulton County, Georgia, was in error in denying a temporary injunction and in holding that an injunction should issue restraining members of organized labor who were having their wages depressed by the failure of the City of Atlanta to enforce its contract provisions with the Defendant herein from exercising its freedom of speech by using the most effective means to bring to the attention of the general public and the employees who were working for less wages than their contract authorized to be paid them that the picketing persons' own elected Representatives, the Officials of the City of Atlanta, were, to the detriment of all labor, failing to enforce a contract on a project financed through the tax money of the citizens of the City of Atlanta, including those picketing.

(g) In granting said injunction said court deprived Petitioner in Certiorari of freedom of speech in violation of the 14th Amendment to the constitution of the United States.

(h) In granting said injunction, said court deprived Petitioner in Certiorari of rights protected by the National Labor Relations Act, Title 29, Section 157 of the United States Code Annotated.

(i) In granting said injunction said court assumes jurisdiction of a cause, the subject matter of which had been pre-empted by enactment of the National Labor Relations Act, Title 29, Section 157-158(b) of the United States Code Annotated.

CONSTITUTIONAL PROVISION INVOLVED

The 14th Amendment, Section 1, to the Constitution of the United States provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges of amenities of ctitzens of the United States; nor shall any state deprive any persor of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES WHICH ARE INVOLVED

Title 29, Section 157, United States Code Annotated:

"employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining, or other mutual aid or protection, and shall also have the right to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 158 (a)(3) of this title."

Title 29, Section 158(b), United States Code Annotated:

"it shall be an unfair labor practice for a labor organization or its agents:

"(1) To restrict or coerce (A) employees in the exercise of the rights guaranteed in Section 157 of this title; Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employee in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

"To cause or attempt to cause an employer to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to temper the periodic

dues and the initiation fees uniformly required as a condition acquiring or retaining membership;"

The Statute referred to by the Court in its opinion, Section 54-804 of the Code of the State of Georgia, is as follows:

"COMPELLING PERSONS TO JOIN, OR REFRAIN FROM JOINING, LABOR ORGANIZATION, OR TO STRIKE OR REFRAIN FROM STRIKING. — It shall be unlawful for any person, acting alone or in concert with one or more other persons to compel or attempt to compel any person to join or refrain from joining any labor organization, or to strike or refrain from striking against his will, by any threatened or actual interference with his person, immediate family, or physical property, or by any threatened or actual interference with the pursuit of lawful employment by such person, or by his immediate family. (Acts 1947, pp. 620, 621.)"

The Section of the Code of the State of Georgia to which the Supreme Court of Georgia made reference, being Section 66-9906, is as follows:

"UNLAWFULLY PREVENTING LABORERS, ETC., FROM PERFORMING DUTIES.— Any person or persons, who, by threats, violence, intimidation, or other unlawful means, shall prevent or attempt to prevent any person or persons from engaging in, remaining in, or performing the business, labor, or duties of any lawful

employment or occupation, shall be guilty of a misdemeanor. (Acts 1887, p. 107.)"

STATEMENT OF THE CASE

The undisputed evidence established that the City of Atlanta entered into a contract with the Defendant in Certiorari, S. J. Curry, C. D. McKnight, Jr., E. G. Hightower and J. E. Tappan, doing business as S. J. Curry & Company, a partnership, for construction of a sewage disposal plant known as the South River Sewage Disposal Plant, located in the City of Atlanta, Georgia. It was stipulated that the Defendant in Certiorari during the twelve months immediately preceding the filing of this action purchased raw materials, equipment and supplies in a value in excess of $50,000.00, which was purchased and shipped from points beyond the State of Georgia to points within the State of Georgia. (Tr. page 7.) Said contract contained the following language: "Wages will conform with those being paid on similar types of work in the Atlanta area". (Tr. page 7.) It was undisputed that the Defendant was paying substantially less than the prevailing wage for such types of work in the Atlanta Area. (Tr. Exhibits E, F, G, H, I, J.) It was not disputed that no picketing resulted until six or seven months after a conference with Defendant in Certiorari and not until after the Petitioner made repeated and constant efforts to prevail upon the City of Atlanta to enforce its contract and to require the Defendant to pay the prevailing wage in the area. Several conferences were held with Mr. Jack Savage,

the City Attorney of the City of Atlanta, in an effort to have this contract enforced, and a hearing was held before the Board of Aldermen of the City of Atlanta in which the Petitioner presented its contention that the City should enforce its claim and it was undisputed that the Board of Aldermen entered an order stating: "After a lengthy discussion, this matter was referred to Executive Session where the Committee agreed that there is nothing that the City can legally do so as to make Curry *raise his pay scale*". (Emphasis supplied.) It was only after the constant meetings with the City Attorney and the hearing before the Board of Aldermen had proven without avail, and only after the Board of Aldermen had officially stated that there was nothing they would do to enforce the contract that the Petitioner herein placed a picket sign in front of the construction work being done by the Defendant, thereby advising the employees working for the Defendant and the General public that the Defendant in Certiorari was paying depressed wages in violation of its contract and the City of Atlanta was not enforcing its contract in requiring wages to be paid similar to those paid in the Atlanta area. Said picket sign read as follows: "S. J. Curry & Company, Inc., violating contract with City of Atlanta by not paying wages conforming with those of a similar type of work in the Atlanta area. Construction & General Laborers' Union 438, AFL - CIO". (Tr. Exhibit E, pages 3, 4, 5; Exhibit F, page 3.) (Tr. pages 3, 4, 5.)

Defendant in Certiorari filed a petition in the Superior Court of Fulton County, Georgia, praying that the Superior Court of Fulton County, Georgia, issue temporary restraining order, temporary injunction and permanent injunction restraining the Petitioner from engaging in said picketing. The matter came on for hearing before the Honorable Claude D. Shaw, Superior Court Judge, on application for temporary restraining order, following which the said Judge denied the application for temporary restraining order. Thereupon, the matter was set for hearing upon temporary injunction, and on the 12th day of September, 1961, the matter came on for hearing before the Honorable Ralph H. Pharr, Superior Court Judge, on application for temporary injunction, at which time the evidence as hereinabove stated was fully presented, and the Honorable Ralph H. Pharr, exercising his equity discretion as Superior Court Judge, found that the Petitioner was engaging in picketing for the purpose of publicizing the fact that the Defendant in Certiorari was not paying the prevailing wage in the Atlanta area, in violation of its contract with the City of Atlanta. Said Judge found that the language upon said picket sign was true and that the Defendant herein was violating said contract and therefore that the Petitioner herein was exercising its freedom of speech by publicizing said fact and therefore said application for temporary injunction was denied.

The Defendant prayed an appeal to the Supreme Court of the State of Georgia, and argument upon said appeal was heard and Briefs filed, whereupon said

Court rendered its decision on the 4th day of January, 1962, which decision is attached to this Petition for Certiorari. Said decision held that the language upon the picket signs was true and that the wages being paid were not those conforming with those wages being paid in the Atlanta area and that said failure to pay said wages constituted a breach of contract, but notwithstanding said findings and the finding that the picketing was entirely peaceful at all times, the Court held that the Trial Court was in error in denying the application for temporary injunction and held that the application for temporary injunction should have been granted. On the 16th day of January 1962., remittitur issued by the Supreme Court of Georgia and judgment was entered overruling the decision of the Honorable Ralph H. Pharr, Judge of the Superior Court of Fulton County, Georgia, and granting the prayer for temporary injunction.

At the hearing, both in the Superior Court and the Supreme Court of the State of Georgia, Petitioner in Certiorari in oral argument and in brief before the Supreme Court of Georgia made the contention that to grant the prayers of the Petitioner in Certiorari as protected by the Fourteenth Amendment to the Constitution of the United States and Section 7 of the National Labor Relations Act, Title 29, Section 157 of the United States Code Annotated. The contention was similarly made that the subject matter of said cause had been preempted by the United States Government by enactment of the National La-

bor Relations Act, Title 29, Section 141 et seq. of the United States Code Annotated.

In reaching this rather surprising result, the Supreme Court of Georgia did the following things:

(1) Deprived the Petitioner of life, liberty or property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, in that said Court deprived the Petitioner of its freedom of speech to publicize by means of peaceful picketing the fact that Defendant in Certiorari was paying depressed wages in violation of its contract and Petitioner's own elected Officials, the Officials of the City of Atlanta, were not enforcing a contract entered into for the benefit of those persons working upon the project and for the benefit of the wage structure of all of labor within the Atlanta area, and that a project being constructed by the tax money of the citizens of Atlanta, including those engaged in picketing, was being expended in violation of the terms of the solemn contract and in such manner as to undermine the wage structure in the Atlanta, Georgia, area.

(2) The Court accepted jurisdiction and issued an injunction in a cause concerning which it did not have jurisdiction of the subject matter of said cause, because of the fact that the subject matter of the said cause had been preempted by the United States Government by enactment of the National Labor Rela-

tions Act, Title 29, Section 140, et seq., of the United States Code Annotated.

(3) That the Court, by issuing said temporary injunction restraining said picketing, violated rights of the Petitioner preempted by the United States Government by enactment of the National Labor Relations Act, Title 29, Section 141 et seq., United States Code Annotated, and more particularly Section 157 thereof, in that it denied Petitioner in Certiorari the privilege of peacefully engaging in concerted activity to publicize a breach of contract destructive to its members' wages, hours and working conditions.

WAY CONSTITUTIONAL AND FEDERAL QUESTIONS WERE RAISED BELOW

Plea in abatement was filed in the trial court raising said questions. However, under Georgia procedure a Plea in Abatement is not ruled upon as such at a temporary injunction hearing, and therefore was not a part of the record on appeal. However, the court may and does consider all questions raised in the pleading in ruling whether temporary injunction should issue. All of said constitutional and federal issues were raised and argued both in the trial court and in the Supreme Court of Georgia.

(See part of brief to ~~Superior~~ Supreme Court of Georgia raising said issue, Appendix, pp. 68-75.)

REASONS REVIEW SHOULD BE GRANTED

Petitioner respectfully submits that this Court should grant this review on certiorari because the case involved is of great public concern and contains matters of gravity and importance not only to your Petitioner but also to others similarly situated throughout the entire United States. The gravity and importance of the matters in the public concern will be manifest to this Court upon a consideration of this Petition for Certiorari. Petitioner suggests and urges the following reasons, among others, for which the Petition for Certiorari comes within the purview of this Court and should be granted.

(1) In the State of Georgia the hearing upon the application for temporary injunction is in actuality the final hearing in a labor dispute. In Fulton County, Georgia, a case will not come on for trial upon the final merits of the controversy within less than one (1) year from the date of the filing of the original petition, (Exhibit 2 to this Petition) by which time the controversy is invariably entirely moot, the strike being terminated, the construction project in almost all cases being completed. The only hearing having any possible bearing upon the controversy before said controversy becomes moot is a hearing upon application for temporary injunction. Review of the records of the Superior Court of Fulton County, Georgia, which County encompasses most of the City of Atlanta and is the largest County in the State of Georgia, reveals the fact that beginning in the year 1952 and con-

tinuing to date hearing upon application for interlocutory injunction were heard in 46 cases, and not a single one of said cases proceeded to final hearing. The style of said cases and the relief granted is as follows: (Affidavit of Thomas L. Carter, Jr., Exhibit 3 to this Petition.)

TEMPORARY INJUNCTION GRANTED RESTRAINING ALL PICKETING AND/OR ENTIRE STRIKE

(Said cases were filed during the two year periods of time set forth under the word "DATE".)

Style	Case No.	Book No.	Page No.	Date
The Jordan Co., vs. Local Union No. 225 United Brotherhood of Carpenters and Joiners of America.	A-90561	S-8	526	1960-61
Morgan Plumbing & Heating Co., vs. Local 72, Plumbers Union.	A-77975	K-8	588	1960-61
The Dickey Construction Co., vs. Local 72, Plumbers Union.	A-79492	L-8	546	1960-61
H. W. Ivey Construction Co., Inc., vs. Local 72, Plumbers Union.	A-90468	S-8	434	1960-61
R. L. Eskew Contracting Co. vs. Local 613, Electrical Workers Union.	A-73411	H-8	706	1958-59
R. L. Eskew Contracting Co., vs. Local 72, Plumbers Union.	A-73635	I-8	18	1958-59
Perry Printing Process Co., vs. Local 72, Plumbers Union.	A-74953	I-8	678	1958-59

Style	Case No.	Book No.	Page No.	Date
Maple Drive Investment Corp., v. Local 85, Sheet Metal Workers Union.	A-68334	E-8	567	1958-59
Huckabee Transport Corp., vs. Local 728, Teamsters Union.	A-73591	H-8	796	1958-59
F. N. Thompson, Inc., vs. District Council No. 38 and Local No. 193, Printers Union.	A-68018	E-8	409	1958-59
H. W. Ivey Construction Co., Inc., vs. Local 438, Laborers Union.	A-68595	E-8	698	1958-59
The Bonny Corporation vs. Local 438, Laborers Union.	A-76808	K-8	4	1958-59
H. W. Ivey Construction Co., vs. Local 438, Laborers Union.	A-76809	K-8	13	1958-59
Johnson Freight Lines, Inc., vs. Local 728, Teamsters.	A-68453	E-8	698	1958-59
Dixie Ohio Express, Inc., vs. Local 728, Teamsters	A-68454	E-8	698	1958-59
Ryder Truck Lines, Inc., vs. Local 728, Teamsters Union.	A-77184	K-8	192	1958-59
Maple Drive Investment Corp., vs. Local 926, Operating Engineers.	A-68505	E-8	653	1958-59
Maple Drive Investment Corp., vs. Local 438, Laborers Union.	A-68596	E-8	698	1958-59
Georgia Utility Construction Co., vs. Local 72, Plumbers; Local 438, Laborers Union; and Local 926, Operating Engineers Union.	A-63539	B-8	570	1956-57

Style	Case No.	Book No.	Page No.	Date
Campbell Coal Co., vs. Local 859, Teamsters Union; Local 926, Operating Engineers; Local 438, Laborers Union.	A-54285	V-7	743	1956-57
Loo Mac Freight Lines, Inc., vs. Local 728, Teamsters Union.	A-56267	X-7	134	1956-57
The Thomas Pipe Line Co., Inc., vs. Local 225, Carpenters Union.	A-57717	Y-7	58	1956-57
H. W. Ivey Construction Co., vs. Bricklayers and Masons Union No. 8 of Georgia.	A-51320	V-7	60	1954-55
Atlanta Steel Erectors, Inc., vs. Local 859, Teamsters Union.	A-47283	R-7	442	1954-55
George's Pick-Up and Delivery Service vs. Local 728, Teamsters Union.	A-49028	S-7	51	1954-55
Lance Roofing Co., Inc., vs. Local 136, United Slate Tile & Composition Roofers Union.	A-49087	S-7	44	1954-55
F. A. Nart Mfg. Co., vs. Local 122, Ladies Garment Workers Union.	A-44558	P-7	679	1954-55
Lockheed Air Craft Corp., vs. Local 438, Laborers Union.	A-33165	I-7	583	1952-53
Southern Bell Telephone & Telegraph Co., vs. Local 10-322, Communications Workers Union, et al.	A-29643	G-7	422	1952-53

INJUNCTION GRANTED RESTRAINING OR LIMITING PICKETING CONDUCT

Style	Case No.	Book No.	Page No.	Date
Southern Airways, Inc., vs. Airline Pilots Association International.	A-81199	M-8	600	1960-61
McGregor & Werner, Inc., vs. Atlanta Bookbinders and Bindery Women's Union Local No. 96, International Brotherhood of Bookbinders, AFL - CIO.	A-88153	R-8	77	1960-61
Aero Corporation vs. Atlanta District Lodge 46, Machinsts AFL - CIO.	A-85468	P-8	334	1960-61
John W. Burdette vs. Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL - CIO, Local No. 732.	A-88083	R-8	42	1960-61
Golian Steel and Iron Co., vs. Shopmen's Local 616, Iron Workers, AFL - CIO.	A-75089	I-8	745	1958-59
Atlantic Steel Co., vs. Local 2401, Steel Workers Union.	A-70517	G-8	59	1958-59
Pleasure Togs, Inc., vs. Local 122, Ladies Garment Workers Union.	A-60484	Z-7	64	1956-57
Swift & Co., vs. Local 355, United Packing House Workers Union.	A-61040	A-8	120	1956-57
American Box and Paper Co., vs. Local 8, Printing Pressmen and Assistants Union.	A-49039	S-7	520	1954-55

Style	Case No.	Book No.	Page No.	Date
Parks Garment Co., vs. Local 122, Ladies Garment Workers Union.	A-47129	R-7	365	1954-55
Dixie Wholesale Co., Inc., vs. Local 728, Teamsters Union.	A-50342	T-7	371	1954-55
Metal Arts Mfg. Co., vs. District Lodge No. 46, Fulton Lodge No. 2, Machinists Union.	A-37855	L-7	528	1952-53

TEMPORARY INJUNCTION DENIED

Style	Case No.	Book No.	Page No.	Date
Bill's Delivery Service, Inc.; vs. Local 728, Teamsters Union.	A-57531	X-7	766	1956-57
Southern Railway Co., vs. Local Lodge No. 354, Brotherhood of Railway Carmen.	A-57495	X-7	748	1956-57
Pilot Freight Carriers, Inc., vs. Local 312, Teamsters Union.	A-44949	Q-7	75	1954-55
Pilot Freight Carriers, Inc., vs. Local 182, Teamsters Union.	A-44903	Q-7	52	1954-55
Pittsburgh Plate Glass Co. vs. Local Union 193 and District Council No. 38, Painters Union; Atlanta Bldg., and Construction Trades Council.	A-40342	N-7	171	1952-53

It will be observed from the above record that in a full decade only five cases have resulted in a denial of application for injunction, and in not a single case within the last ten years has the matter proceeded beyond the temporary injunction stage.

In *none* of said cases did the case ever come on for final hearing, but the temporary injunction hearing was completely determinative of the cause.

(2) If this Court fails to grant certiorari in this cause upon hearing of interlocutory injunction, the controversy in such matters always being moot by the time they can be heard upon application for final injunction, not only the Petitioner but all of labor will be enjoined and prevented from exercising its freedom of speech to publicize a labor controversy and to publicly criticise its own elected Officials and to advertise the manner in which public Officials are spending the tax dollars of the citizens of the municipality, and the hard won rights of freedom of speech as protected by the Fourteenth Amendment to the Constitution of the United States will be a nullity.

(3) The decision and judgment of the Supreme Court of the State of Georgia constitute a violation of the rights not only of Petitioner but of all citizens to, by the carrying of placards, exercise their freedom of speech in publicizing admittedly truthful facts relating to the conduct and activities of their duly elected Representatives.

(4) Rights protected by the Government of the United States by enactment of the National Labor Relations Act, Title 29, Section 141, et seq., of the United States Code Annotated, will be violated, and due to the fact that the controversies are always moot

before they come on for hearing upon final application for injunction there will be no redress.

(5) A temporary injunction will remain in full force and effect in labor relations matters preempted by the United States Government by enactment of the National Labor Relations Act, Title 29, Section 141, et seq., of the United States Code Annotated.

(6) The uniformity of the law sought by the United States Government by enactment of the National Labor Relations Act will be destroyed, and said Act will have no meaning within the State of Georgia.

ARGUMENT

THE TEMPORARY INJUNCTION HEARING IS ACTUALLY THE FINAL HEARING

It is respectfully submitted that the purposes of the rule of the Supreme Court of the United States that it will not grant certiorari from a decision at an interlocutory stage of the proceedings below but will grant certiorari from a final judgment only do not have applicability in the situation found in the case at bar. For all practical purposes the interlocutory injunction hearing in the State of Georgia and most particularly in Fulton County, Georgia, the most populace County in the State of Georgia, is the final hearing ever held in a labor relations matter. A total of 46 cases have been held involving applications for

temporary injunctions in the labor relations field within the last ten years. In this period of time *not a single case* has gone to hearing upon final application for injunction for the very apparent and important reason that it takes approximately a year, or more, for a case to reach the calendar on application for final injunction, and the matters are always moot by the time they are heard on application for final injunction. The hearing which determines the rights of the parties and which determines whether the picketing shall continue at such time as it is not moot is invariably the temporary injunction hearing. There is no final hearing in these matters. The temporary injunction hearing is for all practical purposes the final hearing and the only hearing that can have any possible consequences relevant to any of the matters involved in those litigations. For the Court to refuse to hear any case because it is an appeal from a temporary injunction which injunction will remain in full force and effect until long after the construction project is completed and the dispute is at an end is to deny to the parties therein absolutely all redress.

The decision of the Supreme Court of the State of Georgia in the case at bar involves a most serious violation of the Bill of Rights as protected against State action by the Fourteenth Amendment to the Constitution of the United States. It constitutes an invasion of the hard won Anglo-Saxon principle of freedom of speech, including the right to criticise any public Official in any truthful, peaceful manner. It also con-

stituted an invasion by the Courts of the State of Georgia of a field of law preempted by the United States Government by enactment of the National Labor Relations Act, Title 29, Section 141, et seq. There will be no redress at any time in cases of this kind unless certiorari is granted as prayed.

The case at bar is not an isolated incident of the Supreme Court of the State of Georgia misinterpreting the decisions of the Supreme Court of the United States. A body of precedent is being established in the State of Georgia, which it is respectfully submitted is inconsistent with the decisions of the Supreme Court of the United States and no redress has been obtainable because of the fact that said cases were always determined at the temporary injunction stage and the cases never reached final hearing.

In the case of *Ellis vs. Parks*, 212 Ga., 540, 93 S.E. 2d, 708, decided July 10, 1956, the Supreme Court of Georgia found that temporary injunction should issue because the union had been found by the United States District Court to be liable in damages under Section 303 of the National Labor Relations Act, Title 29, Section 187 U.S.C.A., for striking for recognition in the face of the certification of another union by the National Labor Relations Board. Said United States District Court case was styled as *Parks vs. Atlanta Printing Pressmen & Assistants' Union*, 150 Fed. Supp., 246, and said case was appealed to the United States Fifth Circuit Court of Appeals, which rendered opinion reported in 243 Fed. 2d, 284. The State

Court granted said temporary injunction because of a holding in said damage suit in Federal Court that the National Labor Relations Act had been violated, the State Supreme Court stating with reference to Federal preemption the following:

> "This State has the power to enforce its Constitution and laws in such a case, and the offenders can find no refuge behind the Taft-Hartley Act, 29 U.S.C.A., Section 141, et seq. That law was not intended to protect unlawful conduct."

The case at bar represents a mere extension of the decision of the Supreme Court of the State of Georgia in the case of *Fleming vs. H. W. Ivey Construction Co.*, reported in 215 Ga., 460, 111 S.E. 2d, 97. Ivey Construction Company was the general contractor engaged in construction of a building at the University of Georgia. The Court found in said case that the union had verbal contracts with a sub-contractor on said project, Wren Construction Company, providing that in all construction in the State of Georgia Wren Construction Company would pay an hourly wage of $3.85. On said construction at the University of Georgia, Wren Construction Company only paid the sheet metal workers $3.35 rather than the $3.85 per hour as agreed. The sheet metal workers erected a picket sign stating that Wren Construction Company was paying less than the union scale. The Court found that it did not definitely appear from the record whether or not the union represented a majority of the employees. The Superior Court granted a tem-

porary injunction and on appeal the Supreme Court of the State of Georgia held that the grant of said injunction was proper. Examination of the said case will reveal that the Supreme Court of Georgia in so deciding held as follows:

1. Since there was no hiring hall required by the contract, the contract was without consideration and unenforceable.

2. That interstate commerce was not involved. The Court so held notwithstanding the fact that the Ivey Construction Company admitted that some of the materials going into said construction were shipped from points beyond the State of Georgia and said case was determined prior to elimination of the "no man's land" in the 1959 Amendments.

3. Since it did not affirmatively appear in the record that the union represented a majority of the employees, although there was no evidence that they did not represent a majority of the employees, the union had no right to publicize the fact that said company was only paying $3.35 an hour, wereas the prevailing union rate was $3.85 per hour.

4. Although the Court held that the picketing was entirely peaceful, it stated: "As stated heretofore by this Court in Ellis vs. Parks, 212 Ga., 540, 93 S.E. 2d, 708, the State has the power to enforce its Constitution and Laws and the mere fact that the Federal Government has enacted legislation to diminish the cause of labor

> disputes threatening or obstructing interstate and foreign commerce in nowise excludes the exercise of the police power of the State."

In said case the Court stated:

> "Where there is any evidence to support the ruling of the lower court the discretion of the trial judge will not be controlled in the grant or denial of a temporary injunction. Thus, this court cannot hold that there was an abuse of discretion here. See Log Cabin Steak Co., vs. Burton, 212 Ga., 648, 94 S.E. 2d, 694, and cases cited therein; Woodard vs. Collier, 210 Ga., 239, 78 S.E. 2d, 526, supra; Ellis vs. Parks, 212 Ga., 540, 93 S.E. 2d, 908, supra."

This principle of law was neither mentioned nor applied in the case at bar in which case the trial court had held that injunction should *not* issue.

It is, therefore, respectfully submitted that the Supreme Court of the State of Georgia has consistently misinterpreted the decisions of the Supreme Court of the United States both on the subject of Federal preemption and on the question of freedom of speech under the Fourteenth Amendment to the Constitution of the United States. Due to the fact that said decisions arise at the temporary injunction state and *without exception* never proceed beyond that stage all of labor throughout the State of Georgia is completely without redress.

Of course, for every case carried to the State Supreme Court there are great numbers of cases in which the trial courts have granted injunctions based on said precedents set by the Supreme Court of the State of Georgia.

This Court has indicated that the rule of finality is not an absolute one and that the language used by Congress in 1789, in conferring power of review in this Court, will not be applied literally or mechanically. As stated by Mr. Justice Frankfurter in *Radio Station WOW v. Johnson*, 326 U.S., 120, at 124, speaking for the majority of the Court:

> "But even so circumscribed a legal concept as appealable finality has a penumbral area . . . Considerations of English usage as well as those of judicial policy would readily justify an interpretation of 'final judgment' so as to preclude reviewability here where anything further remains to be determined by a state court, no matter how disassociated from the only Federal issue that has finally been adjudicated by the highest court of the State . . .
>
> "Unfortunately, however, the course of our jurisdictional history has not run as smoothly as such a mechanical rule would make it. To enforce it now, or to pronounce it for the future, would involve disregard of at least two controlling precedents, both of them expressing the views of numerous courts, and one of which has stood in our books for nearly a hundred years, in an

opinion carrying the authority, especially weighty in such matters, of Chief Justice Taney."

In the earlier case referred to in the above quoted opinion—*Forgay vs. Conrad*, 6 How. 201, Mr. Chief Justice Taney first indicated a policy of liberally interpreting and applying the requirement of finality as follows:

> "The question upon the motion to dismiss is whether this is a final decree, within the meaning of the Acts of Congress. Unfortunately, it is not final, in the strict, technical sense of that term. But this Court has not heretofore understood the words 'final decrees' in this strict and technical sense, but has given to them a more liberal, and, as we think, a more reasonable construction, and one more consonant to the intention of the Legislature."

Republic Natural Gas Company vs. Oklahoma, 334 U.S. 62, followed *Radio Station WOW v. Johnson*. Mr. Justice Frankfurter, again speaking for the majority, indicated an additional area in which the requirement of finality would not be rigidly applied. In discussing a situation in which review would be permitted even though no technical finality was present, Justice Frankfurter indicated that a rigid application would not be required and that the rule would be relaxed where there existed "any immediate threat of irreparable damage . . . rendering postponed review so illusory as to make the decree 'final now or never'."

Mr. Justice Rutledge, dissenting in the *Republic Natural Gas Company* case, *supra*, reviewed the decisions of this Court which abjure a rigid and literal interpretation of the word "final" as appears in Section 1257 of the U. S. Code and concluded as follows:

> "The fact that all phases of the litigation are not concluded does not necessarily defeat our jurisdiction . . . But not every decision by a State court leaving the controversy open to further proceedings and orders is either inconclusive of the issues or premature for purposes of review under Section 237. This appears most recently from the decision in *Radio Station WOW v. Johnson* which applied a settled line of authorities to that effect. Cf. *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 91 L.Ed. 80, 67 S.Ct. 156.
>
> "In such cases the formulation of the test of finality made in the Gospel Army and like decisions has not been followed. Instead that question, in the special circumstances, has been treated as posing essentially a practical problem, not one to be determined either by the label attached to the state court judgment by local law, Richfield Oil Corp., vs. State Bd. of Equalization (US) supra, or by the merely mechanical inquiry whether some further order or proceeding beyond 'the ministerial act of entering the judgment' may be had or necessary after our decision is rendered. Radio Station WOW vs. Johnson, supra (326 US, at 125, 89 L.Ed. 2097, 65 S.Ct. 1475) . . . The section's [1257] policy to furnish full, ade-

quate and prompt review outweighed any design to secure absolute and literal 'finality'."

In considering whether to exercise its jurisdiction to review, this Court has considered substance rather than form and has indicated that the face and form of the judgment is not controlling. *Clark vs. Williard*, 292 U.S. 112, at 118; *Gospel Army vs. Los Angeles*, 331 U.S. 543, at 546.

Mr. Justice Brandeis, speaking for the full Court in *Myers vs. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, has laid down a rule of policy which is directly applicable here. We appreciate, of course, that the decision is not decisive, review by this Court of the Circuit Courts of Appeal of temporary orders and judgments of the federal district courts not having the same statutory basis as review of state court judgments. Nevertheless the considerations which persuaded the Court in that case to relax its policy of denying review of temporary orders of the federal district courts, is equally persuasive here, the status of the litigation in that case paralleling the status of the litigation here and similar legal points being at issue: Justice Brandeis stated as follows:

"The Circuit Court of Appeals should have reversed the decrees for a preliminary injunction. It is true that ordinarily the decree of a District Court granting or denying a preliminary injunction will not be disturbed on appeal. But that rule of practice has no application where, as here, there was an insuperable objection to the

> maintenance of the suit in point of jurisdiction and where it clearly appears that the decree was the result of an improvident exercise of judicial discretion."

This is not like the usual case in which this Court declines review where it is sought to review a decision in respect to the merits or as to some point made in the course of an otherwise unobjectionable interim proceeding. On the contrary, it is the very action of the state court in undertaking to grant temporary injunctive relief which creates the central issue which gives rise to the federal question. Under such circumstances, it is respectfully submitted that this Court can and should exercise its appellate powers. See *Radio Station WOW vs. Johnson*, supra; *Rescue Army v. Municipal Court*, 331 U.S. 549, at 565-568; *Cohen vs. Beneficial Loan Corp.*, 337 U.S. 541, at 546.

In the case of *Montgomery Building & Construction Trades Council vs. Ledbetter Erection Company*, 344 U.S. 178, 73 Supreme Ct., 196, Mr. Justice Douglas, with Mr. Justice Black concurring, stated in his dissenting opinion:

> "The question presented is the *power* of the state court to issue a temporary injunction in this kind of labor dispute. If petitioners had sought mandamus or another appropriate state writ directed against the judge who issued the temporary injunction, I should have no doubt that it would be a final judgment which we would review. See Bandini Petroleum Co., vs. Superior

Court, 284 U.S. 8, 14, 52 S.Ct. 103, 105, 76 L.Ed. 136. Cf. Rescue Army v. Municipal Court, 331 U.S. 549, 565, 67 S.Ct. 1409, 1417, 91 L.Ed. 1666. I see no difference of substance between that case and this. The mischief of temporary injunctions in labor controversies is well known. It is done when the interlocutory order is issued. The damage is often irreparable. The assertion by the state court of *power* to act in an interlocutory way is final. Whether it has that *power* may be determined without reference to any future proceedings which may be taken. Unless the rule of finality is to be purely mechanical, which to date it has not been, see Radio Station WOW v. Johnson, 326 U.S. 120, 124, 65 S.Ct. 1475, 1478, 89 L.Ed. 2092, we should determine now whether the National Labor Relations Act permits a state court to interfere with a labor controversy in a way, which though interim in form, irretrievably alters the status of the dispute or in fact settles it."

It is respectfully submitted that the Montgomery Building & Construction Trades Council case differed from the case at bar in that no showing was made in that case that in no case could a decision be reached on a hearing upon application for permanent injunction. In the case at bar the records of the Superior Court of Fulton County, Georgia, have been completely researched for a full decade, and in said period of ten years, although 46 cases involving injunctions have been processed, *not one single case* has ever proceeded to hearing beyond the so-called temporary injunction stage. It is, therefore, apparent that what

the Court is asked to review in this case is actually a final judgment.

THE FACTS OF THE CONTROVERSY

It is herewith respectfully submitted that the important and pertinent facts in this cause are without disptue. It is not disputed that the contract between the Defendant in Certiorari and the City of Atlanta contained a provision as follows: "Wages will conform with those being paid on similar types of work in the Atlanta area". It is not disputed and is found by both the Trial Court and the Supreme Court of the State of Georgia that this contract was being violated and that the employees were not being paid the wages being paid for similar type of work in the Atlanta area. It is not disputed and is found both by the Trial Court and the Supreme Court of the State of Georgia that the picketing was at all times peaceful. There is no allegation of any secondary boycott activity or any other violation of law.

The Supreme Court of Georgia states that picketing was a violation of the State's Right To Work Law. However, thehre is no evidence in this case to sustain such a conclusion. It is found that an officer of another organization in the month of January made a statement to Defendant in Certiorari that the Defendant in certiorari must employ union labor. However, there is no evidence at all in the record that the Petitioner in Certiorari at any time made any demand

relating to who must be employed. Irrespective of this fact the evidence is undisputed that no action was taken by any union following the conference in January, 1961, and there was no attempt to compel the employer to in any way violate the State Right To Work Law. The Petitioner in Certiorari did concern itself with having the wage rate increased to conform with the normal wage rate in the area and to conform to the rate Defendant in Certiorari had agreed to pay in its contract with the City of Atlanta. The Petitioner in Certiorari exhausted every possible means to have this wage rate raised before publicizing the fact that depressed wages were being paid in violation of said contract. It is completely undisputed that numerous conferences were held with the City Attorney of the City of Atlanta in an effort to have the wage rate as set forth in the contract complied with and the matter was finally carried to the City Board of Aldermen and the Board of Aldermen in their Order as hereinabove quoted made plain that the only request made by the Petitioner in Certiorari was that the wages be increased. It is undisputed that it was made plain to the City Attorney in all of said conferences that the union was making no contention that any person should be discharged or any person hired, but was only seeking to protect the wage structure in the area. Not one word of evidence apepars in the record to the effect that there was any attempt made throughout the time of these conferences with the City Attorney and this hearing before the City Board of Aldermen stretching over a period of many months immediately prior to the picketing to compel the em-

ployment of union labor, nor was anyone even requested to do so. In view of these facts the Trial Court found that the picketing was for the purpose of publicizing said breach of contract relating to the wage structure and was a protected exercise of freedom of speech and could not be enjoined. On the original application for temporary restraining order another Judge refused temporary restraining order on the same ground. There is no basis in the evidence on the undisputed facts of any finding that the picketing in this cause was for an illegal purpose. The Petitioner in Certiorari showed an unusual amount of patience in exhausting every other method of getting the wage scale increased, and only after six or seven months of persistent futile efforts and only after the City Board of Aldermen had ruled that they would do nothing about the matter did the Petitioner in Certiorari resort to its only remaining redress, which was to call to the attention of the public, including Defendant in Certiorari's employees, the detriment that was being done to the wage structure of labor in the Atlanta area.

The Petitioner is not a group of outsiders or interlopers involving itself in something that does not concern it. The undisputed evidence establishes that most construction projects are given on competitive bids, and that a company paying depressed wages can underbid the companies who are paying the union scale. The result is that those companies paying the union scale will eventually go bankrupt for want of securing successful bids or to prevent such a result

must in turn reduce their wages to that of the depressed wage structure of the company not paying the standard wage. The ultimate result of this cycle is the comp'ete destruction of all of the hard won wage rates won by labor over many years. It was to prevent this result that the Petitioner concerned itself with this breach of contract. It is further submitted that the Petitioner was not a disinterested outsider because this was not a contract between two private employers, but it was a contract which had been entered into by the City of Atlanta, of which the Petitioner is a part. As citizens of the City of Atlanta the Petitioner had a right to concern itself with the actions of the City of Atlanta, particularly when they had a direct bearing upon wages, hours and working conditions, the betterment of which is the primary function and purpose of existence of the Petitioner. The funds being expended for construction of this project were being paid out of the City Treasury, which receives its funds entirely from the taxes exacted from the citizens of Atlanta including the members of the Petitioner Union. Therefore, the Petitioner had a very direct and real concern in this breach of contract.

PICKETING WAS THE ONLY PRACTICAL WAY OF PUBLICIZING THE FACTS

There was no other method of publicizing this breach of contract which could approach in effectively conveying the message the method which was adopted.

The peop'e most directly concerned in this breach of contract other than labor generally were those who were employed by the Defendant in Certiorari on the construction project and were being paid wages less than they had a contract right to obtain. These persons by working for less wages than the contract with the City of Atlanta called for were making it possible for the Defendant in Certiorari to violate the contract and to depress the wage structure and to destroy the rights of labor generally. These were the persons to whom it was most important for the message to be conveyed and it was most important that they be informed of the fact that they were not receiving the wages they were entitled to under the contract and that by so doing they were undercutting and destroying the right of labor and the wage structure of labor in the greater Atlanta area. The only really effective way of bringing this message to the attention of all of the persons who were most directly involved was by placing this message upon a placard in front of the place where these employees worked. That was the only possible way of conveying the message in such way that all of the people working on the project would know that the City of Atlanta had contracted with the Defendant for the payment of a greater wage than they were receiving and that by working for less said employees were injuring the living standards of labor generally. Therefore, the carrying of the message upon a placard in front of the place of business was not only one way of conveying the message, but was the most effective and quite possibly the only effective way of conveying the message.

PETITIONER IN CERTIORARI HAD A CONSTITUTIONAL RIGHT TO PUBLICIZE THE FACTS ALTHOUGH IT DID NOT REPRESENT THE EMPLOYEES OF THE DEFENDANT IN CERTIORARI.

The Supreme Court of the United States has consistently held that the mere fact that the picketing is being done by persons other than those employed by the company picketed is not adequate or sufficient grounds to deprive those persons of the right to picket, and to seek to so deprive the said persons of said picketing is to infringe upon their freedom of speech as protected by the Fourteenth Amendment to the Constitution of the United States.

In the case of *American Federation of Labor vs. Swing*, 312 U.S. 321, the Court said:

> "A union of those engaged in what the record describes as beauty work unsuccessfully tried to unionize Swing's beauty parlor. Picketing of the shop followed. To enjoin this interference with his business and with the freedom of his workers not to join a union, Swing and his employees began the present suit. In addition, they charged the use of false placards in picketing and forcible behavior towards Swing's customers. . . .
>
> ". . .

"Such a ban of free communication is inconsistent with the guarantee of freedom of speech. That a state has ample power to regulate the local problems thrown up by modern industry and to preserve the peace is axiomatic. But not even these essential powers are unfettered by the requirements of the Bill of Rights. The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in the industrial dispute, whether those limits be defined by statute or by the judicial organ of the state. A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry has become commonplace. American Foundries v. Tri-City Council, 257 U.S. 184, 209. The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ. Communication by such employees of the facts of a dispute, deemed by them to be relevant to their interests, can no more be barred because of concern for the economic interests against which they are seeking to enlist public opinion than could the utterance protected in Thornhill's case. 'Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution.' Senn v. Title Lawyers Union, 301 U.S. 468, 478."

In the case of *Thornhill vs. Alabama*, 310 U.S. 88, the Supreme Court of the United States held:

> "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment (Note No. 19). The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the times. (Note No. 20). The Continental Congress in its letter sent to the Inhabitants of Quebec (October 26, 1774) referred to the 'five great rights' and said: 'The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs.' Journal of the Continental Congress, 1904 ed., vol. I, pp. 104, 108. Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which informtaion is needed or appropriate to enable the members of society to cope with the exigencies of their period.

"In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. Hague v. C. I. O., 307 U.S. 496 [4 LRR Man. 501]; Schneider v. State, 308 U.S. 147, 155, 162-63 [5 LRR Man. 659]. See Senn v. Title Lawyers Union, 301 U.S. 468, 478. It is recognized now that satisfactory hours and wages and working conditions in industry and a bargaining position which makes these possible have an importance which is not less than the interests of those in the business or industry directly concerned. The health of the present generation and of those as yet unborn may depend on these matters, and the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing. The merest glance at State and Federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private concern. Free discussion concerning the conditions in industry and the causes of labor disputes appear to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society. The issues raised by regulations, such as are challenged here, infringing upon the right of employees effectively to inform the public of the facts of a labor dispute are part of this larger problem. We concur in the observation of Mr. Justice Brandeis, speaking for the Court in Senn's case (201 U.S. 2d 478): 'Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom

of speech is guaranteed by the Federal Constitution.'

"It is true that the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist (Note No. 21). This is but an instance of the power of the State to set the limits of permissible contest open to industrial combatants. See Mr. Justice Brandeis in 254 U.S. at 488. It does not follow that the State in dealing with the evils arising from industrial disputes may impair the effective exercise of the right to discuss freely industrial relations which are matters of public concern. A contrary conclusion could be used to support abridgment of freedom of speech and of the press concerning almost every matter of importance to society."

In the case of *Cefeteria Employees Union vs. Angelos*, the Court held, in Volume 13 LRRM, 634, 320 U.S. 293:

"But here we have no attempt by the state through its courts to restrict conduct justifiably found to be an abusive exercise of the right to picket. We have before us a prohibition as unrestricted as that which we found to transgress state power in A. F. of L. vs. Swing, supra. The Court here, as in the Swing case, was probably led into error by assuming that if a controversy does not come within the scope of state legislation limiting the issue of injunctions, efforts to make

known one side of an industrial controversy by peaceful means may be enjoined. But, as we have heretofore decided, a state cannot exclude working men in a particular industry from putting their case to the public in a peaceful way 'by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him.' A. F. of L. v. Swing, 312 U.S. at 326 [7 LRR Man. 308]."

In the case of *Bakery and Pastry Drivers and Helpers Local 802 of the International Brotherhood of Teamsters, et al, VS. Wohl et al.*, 315 U.S. 769, the Court held:

"So far as we can ascertain from the opinions delivered by the state courts in this case, those courts were concerned only with the question whether there was involved a labor dispute within the meaning of the New York statutes and assumed that the legality of the injunction followed from a determination that such a dispute was not involved. Of course that does not follow: one need not be in a 'labor dispute' as defined by state law to have a right under the Fourteenth Amendment to express a grievance in a labor matter by publication unattended by violence, coercion, or conduct otherwise unlawful or oppressive."

It is, therefore completely settled that conduct such as is engaged in in the case at bar is protected by the Fourteenth Amendment of the Constitution of the United States.

The Petitioner had a direct and vital concern in the enforcement of the contract of the City of Atlanta. This contract was the contract executed and enforced by their duly elected Representatives. This contract was paid for by their own tax money. They were engaged in peaceful action in advertising a breach of contract in the only really effective way to convey the message to those most directly concerned. It is undisputed and acknowledged by the Supreme Court of Georgia as well as by the Defendant in Certiorari that the language upon the picket sign was true and accurate and there had actually been a violation of contract between the City of Atlanta and the Defendant. This provision of the contract was incorporated in the contract for the protection of labor generally, and its breach was of vital concern to labor generally. All of the picketing was being engaged in in a peaceful manner. All that was being done was to put a truthful statement as to what the City of Atlanta was doing on a placard.

This injunction goes to the very heart of our Constitutional system. The right to make known what is being done by the duly elected Representatives of the citizens of a community is one of the most sacred rights that is protected by the United States Constitution. The Petitioner is now by injunction with resulting threat of contempt of court prevented from exercising its Constitutional privilege of placing upon a placard a truthful statement as to what its City Officials are doing with their tax money and letting the public know what the City Officials are doing. When

the day comes in the State of Georgia or anywhere in the United States of America when Officials cannot have their actions exposed by those being hurt by the actions of these Officials, and when the day comes that the public cannot be informed upon a placard or otherwise of admittedly true actions by the Officials of the City of Atlanta, the Bill of Rights and the Fourteenth Amendment to the Constitution of the United States are a dead letter and freedom of speech is a cherished heritage only of the past.

For this Court to refuse to grant this Petition for Certiorari because it is an appeal from the sustaining of a temporary injunction would be from all practical purposes to deprive the citizens of the State of Georgia of their freedom of speech without remedy and without redress. As hereinabove set forth, in injunction hearings over the last ten years, not a one has gone to final hearing because of the length of time involved and because of the mootness of the matter by the time it would reach final hearing. Therefore, to say that labor has a right to appeal such a case only after it reaches final hearing is to say that labor has a theoretical right but labor has no actual right of protection accorded it by the Supreme Court or the Constitution of the United States. A theoretical right which cannot be practically exercised leaves the Petitioner and all others being deprived of Constitutional rights and privileges absolutely defenseless, as a right which in practicality and actuality does not exist is no actual right at all. Constitutional rights are not to be lost simply because there is a theoretical right of later re-

dress which actually and practically does not exist. The question is not whether appeal will lie now or later, but whether appeal lies now or never. In the normal situation the granting of an appeal at an interlocutory statge might cause the Court to have Petitions of Certiorari presented to it at two rather than one stage of the law suit, and, therefore, would doubly burden the Court. However, this reason for denying an appeal from a temporary injunction hearing vanishes in view of the fact that in labor relations cases the final disposition in the State Court is the temporary injunction hearing and there is no further hearing as a practical matter from which an appeal might subsequently be prayed. It is, therefore, respectfully submitted that the issues in this cause are much more vital that only the issue that confronts the Petitioner vital though that may be. This is an issue as vital as the fundamental principle of freedom of speech, and if certiorari is denied not only will the Petitioner be denied its freedom of speech but the protection of the Fourteenth Amendment will in large measure be denied to citizens throughout the entire United States.

THE ORDER AND JUDGMENT OF THE SUPREME COURT OF THE STATE OF GEORGIA VIOLATES RIGHTS OF THE PETITIONER IN CERTIORARI PROTECTED BY THE NATIONAL LABOR RELATIONS ACT

Not only does the Order and Judgment of the Supreme Court of the State of Georgia violate funda-

mental right of freedom of speech protected by the Fourteenth Amendment to the Constitution of the United States, but said Order and Judgment also are in violation of right of the Petitioner in Certiorari as protected by Section 7 of the National Labor Relations Act, Title 29, Section 157, United States Code Annotated, which reads as follows:

> "Employees shall have the right to self organization to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 157 (a) (3 of this Title."

The picketing engaged in in this cause represented concerted activity of various members of the Petitioner in Certiorari for mutual aid or protection within the meaning of the above quoted Statute. A group of persons whose wage structure would be utterly destroyed within the area if the action of S. J. Curry & Company and the City of Atlanta persisted were concertedly taking action to bring to the attention of the employees working for Curry and the public generally the fact that their wage structure was being utterly and completely destroyed and that it was be-

ing done by means of violation of the contract entered into between Curry and the City of Atlanta.

The Supreme Court of the United States has on numerous occasions held that a State Court cannot prohibit any action which is protected by the National Labor Relations Act. In the case of *Weber vs. Anheuser-Busch, Inc.*, 35 LRRM 2637, 348 U.S. 468, the Supreme Court of the United States said:

> "The Court has ruled that a State may not prohibit the exercise of rights which the Federal Act protects. Thus in Hill vs. Florida, 325 U.S. 538, 16 LRRM 734, the State enjoined a labor union from functioning until it had complied with certain Statutory requirements. The injunction was invalidated on the ground that the Wagner Act included a 'Federally established right to collective bargaining' with which the injunction conflicted. International Union vs. O'Brien, 339 U.S. 454, 26 LRRM 2082, involved the strike vote provisions of a State Act which prohibited the calling of a strike until a specific Statutory procedure had been followed. The State Act was held to conflict not only with the procedure and other requirements of the Taft-Hartley strike provisions, but also with the protection afforded by Section 7 of that Act. In Amalgamated Association vs. Wisconsin Employment Relations Board, 340 U.S. 383, 27 LRRM 2385, the State Court issued an injunction under a Statute which made it a misdemeanor to interrupt by strike any essential public utility service. It was held that the State Statute was invalid in that it denied a right which Congress had guaranteed under Sec-

tion 7 of the Taft-Hartley Act, the right to strike peacefully to enforce union demands for wages, hours and working conditions. Last term the Court noted in Garner v. Teamsters Union, 346 U.S. 485, 499, that: 'The detailed prescription of a procedure for restraining of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. For the policy of the National Labor Management Relations Act is not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing. For a State to impinge on the area of labor combat designed to be free is quite as much an obstruction of Federal policy as if the State were to declare picketing free for purposes or by methods which the Federal Act prohibits.' "

Also see *General Drivers, Warehousemen & Helpers Local Union 89, et al., vs. American Tobacco Company, Inc.*, 348 U.S. 978, 35 LRRM 2709.

In the case of *Building Trades Council vs. Garmon*, 359 U.S. 236, 43 LRRM 2838, the injunction was granted by the State Court in a case in which the union admittedly did not represent the employees working on the job. The Court said:

"When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by Section 7 of the Taft-Hartley Act or constitute an unfair labor practice un-

> der Section 8, due regard for the Federal enactment requires that State jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of Federal regulation involves too great a danger of confiict between power asserted by Congress and requirements imposed by State law. Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed toward the governments of Industrial Relations. Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential flustration of national purposes."

It has been held in a number of cases that regardless of whether conduct is conduct protected or prohibited by the National Labor Relations Act, a State Court has no jurisdiction in the matter. Therefore, even had the conduct of the union been an attempt to coerce the employees, it would have been a Federal and not a State matter. However, it is clear that the action taken was a mere publicizing of a truthful fact.

It is respectfully submitted tha. the State Court had no jurisdiction of this matter for any purpose. The State Court would have no more jurisdiction at the close of this cause than the Court had when it was initially filed. If the Court has no jurisdiction, the entire proceeding is a nullity, and the Supreme Court of the United States can determine this at any time. A failure to grant certiorari at this stage of the proceeding would require the Petitioner in Cer-

tiorari to be bound by a decision not only depriving it of freedom of speech under the Fourteenth Amendment, but also obey an Order issued by a Court having no jurisdiction. Unless the Petitioner in Certiorari should take the risk of subjecting itself to contempt of court it will be governed throughout this entire controversy by an Order entered by a Court having no jurisdiction. Certainly, in view of the fact that experience has shown that the hearing upon Application for temporary injunction is the final hearing in actuality even if not in theory, this Court would have the right to grant certiorari at this stage. A refusal to grant certiorari would mean that freedom of speech to publicize true facts relating to depressing of wages by Defendant in Certiorari and to publicize the actions of its own elected representatives would be lost because of a completely void Order entered by a Court having no jurisdiction of this cause. The theory that any final judgment may be entered in these matters before the controversy becomes moot is a legal fiction and it is submitted that as sacred and fundamental a principle and right as that of freedom of speech should not be lost without any remedy because of a legal fiction.

CONCLUSION

It is, therefore, respectfully submitted that in actuality the decision from which certiorari is prayed is a final judgment rendered by a Court not having jurisdiction of the subject matter of the cause and depriving the Petitioner in Certiorari of fundamental rights

of freedom of speech as protected by the Fourteenth Amendment to the Constitution of the United States. It is further apparent that if certiorari is denied not only the Petitioner but all others seeking to publicize either a labor dispute or by means of a placard the derelictions of its public Officials will be prevented from doing so by court injunction. The Petition for Certiorari should, therefore, be granted as prayed.

Respectfully submitted,

BY: Edwin M. Pearce
Edwin Pearce

and

BY: John S. Patton
John S. Patton,

Attorneys for Petitioner
in Certiorari.

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APPENDIX

"EXHIBIT 1."

Supreme Court of Georgia. Decided

21463. CURRY et al. v. CONSTRUCTION & GENERAL LABORERS UNION LOCAL NO. 438, AFL - CIO.

While the picketing in the present case was peaceful,

> it was for an unlawful purpose, and should have been restrained and enjoined.

HEAD, Presiding Justice. S. J. Curry and others, doing business as a partnership under the name of S. J. Curry & Company, brought a petition for injunction against Local No. 438 of the Construction and General Laborers Union AFL - CIO. The trial judge refused to grant the interlocutory injunction, and the exception is to this order.

November 15, 1960, the petitioners entered into a contract with the City of Atlanta for the construction of certain improvements to sewage disposal facilities of the city. The contract has a limitation of 540 days from December 5, 1960, with a penalty provision for each day beyond the limit in which the work is not completed. The petitioners operate on what is known as an "open shop" basis, that is, they employ workmen without regard to whether or not they are mem-

bers of a labor organization. The petitioners were awarded only the general contract for the construction work. The city subcontracted directly with other contractors for the electrical and plumbing work connected with the project, and the petitioners have no supervision over the work of these contractors. Shortly after the petitioners started on their construction work they were visited by representatives of various local labor unions in the Atlanta area, and a conference was arranged on February 14, 1961. The representatives of the Labor unions requested that the petitioners use union workmen on the job. S. J. Curry, in his affidavit, stated that when he told the union representatives present that the petitioners would not use union members exclusively, since they operate on an "open shop" basis, he was told by Mr. Moore (a representatives of the Building Trades Council of Atlanta) and "other representatives of the unions" that "they would use every means at their command to see that we did use union workmen on our project." On August 10, 1961, a picket was placed by the defendant at the main entrance of the construction site of the petitioners carrying a placard with the following legend: "S. J. Curry & Company, Inc. violating contract with City of Atlanta by not paying wages conforming with those of a similar type of work in the Atlanta area. CONSTRUCTION AND GENERAL LABORERS UNION 438 AFL CIO." The picket has patrolled the construction site since that time, and because of the picket, the employees of the electrical and plumbing contractors have refused to continue their work, and carriers and suppliers have re-

fused to deliver material and supplies. This has resulted in a partial cessation of the work, since the construction can not proceed without electrical and plumbing work and the delivery of essential supplies. The consequence of the partial cessation of work has been the discharge of all but 37 of the 72 men working on the job at the time the picket was established.

The contract of the petitioners with the city contains the following language: "Wages will conform with those being paid on similar types of work in the Atlanta area." The evidence introduced for the defendant showed that the petitioners were not paying their employees the wage scale of specified construction contractors in the Atlanta area. James Moore, in his affidavit, stated that he had attempted to persuade the petitioners to comply with their contract with the city in regard to the payment of wages, and had conferred with officials of the city in an effort to have them require the petitioners to comply with their contract, but had been unsuccessful in both attempts.

"Peaceful picketing is not unlawful, unless it is for an illegal purpose. On the contrary, it is authorized under the constitutional guarantee of free speech." Cook v. Huckabee Transport Corp., 215 Ga. 9 (108 SE 2d 710). The picketing in the present case was peaceful. The trial judge was authorized to find from the evidence that the petitioners were not paying wages conforming with those paid on similar types of work in the Atlanta area. It is asserted by the defendant that it has a right to use the method of picket-

ing to inform the public of the petitioners' failure to abide by the terms of their contract with the City of Atlanta, that it is a matter of legitimate concern to the defendant that the wages paid by the petitioners are lower than those paid on similar types of work in the area, since contracts are ordinarily let on competitive bids and a company paying lower wages can underbid contractors paying union wages.

It is asserted in the petition, and shown by undisputed evidence of the petitioners that the establishment of a picket by a labor union (whatever placard the picket may carry) is a signal to all members of the labor unions to refuse to work on the job, or to furnish supplies for it, and this fact was known to the defendants. The petitioners have no labor dispute with their employees, and the defendant is not representing employees of the petitioner. The defendant has chosen to use a method of imparting information to the public which it knew would have the effect of paralyzing the petitioners' operations, preventing them from completing their contract within the time limit provided by its terms, and forcing them to discharge a number of their employees.

The facts of the present case are similar to those in Powers v. Courson, 213 Ga. 20 (96 SE 2d 577), in which it was held: "The decision of this court in Woodard v. Collier, 210 Ga. 239 (78 S.E. 2d 526), is controlling in the instant case. Here, as in that case, the evidence demands a finding that the picket was placed on the job for the purpose of forcing Powers

to employ only union labor, or be unable to comply with the terms of his contract because of the refusal of the members of other unions employed in the work to cross the picket line, and thereby slow the project to a virtual standstill. As held in that case, such picketing is for an unlawful purpose, and clearly a violation of the provisions of Code (Ann. Supp.) §54-804, and Code §66-9906. See also Local Union No. 10, United Association of Journeymen Plumbers & Steamfitters v. Graham, 345 U.S. 192 (73 Sup. Ct. 585, 97 L.Ed. 946); Ellis v. Parks, 212 Ga. 540 (93 S.E. 2d 708)."

The trial judge erred in refusing the interlocutory injunction.

Judgment reversed. All the Justices concur.

"EXHIBIT 1a."

SUPREME COURT OF GEORGIA

Atlanta, January 4, 1962.

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

C. J. Curry et al v. Construction & General Laborers Union Local No. 438, AFL - CIO.

This case came before this court upon a writ of error from the Superior Court of Fulton County; and, after argument had, it is considered and adjudged that the judgment of the court below be reversed because the court erred in refusing the interlocutory injunction. All the Justices concur.

Bill of Costs, $15.00

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE, ATLANTA

I certify that the above is a true extract from the Minutes of the Supreme Court of Georgia, and that paid the above bill costs.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk

"EXHIBIT 2."

IN THE
SUPREME COURT OF THE UNITED STATES

LOCAL NO. 438 CONSTRUCTION & GENERAL LABORERS' UNION, AFL - CIO,

VS. Case No. .....

S. J. CURRY, C. D. McKNIGHT, JR., E. H. HIGHTOWER and J. E. TAPPAN, DOING BUSINESS AS S. J. CURRY & COMPANY, A PARTNERSHIP.

AFFIDAVIT

GEORGIA, FULTON COUNTY.

I, J. W. SIMMONS, being first duly sworn do hereby make oath that I am Clerk of the Superior Court of Fulton County, Georgia, and that the average time required for a case to come to trial on the final merits in the Superior Court of Fulton County, Georgia, is in excess of one (1) year from the date of the filing of the original petition.

/s/ J. W. Simmons
J. W. Simmons, Clerk, Superior Court of Fulton County, Georgia.

Sworn to and subscribed
before me, this 22nd
day of March, 1962.

/s/ Estelle U. Roberts
Notary Public, Fulton County, Georgia.
My Commission Expires June 13, 1965

(SEAL)

"EXHIBIT 3."

IN THE
SUPREME COURT OF THE UNITED STATES

LOCAL NO. 438 CONSTRUCTION & GENERAL LABORERS' UNION, AFL - CIO,

VS. CASE NO. .....

S. J. CURRY, C. D. McKNIGHT, JR., E. G. HIGHTOWER AND J. E. TAPPAN, DOING BUSINESS AS S. J. CURRY & COMPANY, A PARTNERSHIP.

AFFIDAVIT

GEORGIA, FULTON COUNTY.

I, THOMAS L. CARTER, JR., Attorney, being first duly sworn, hereby solemnly swear that I have carefully searched the records of the Superior Court Clerk's Office of Fulton County, Georgia, and that said records reveal only the following cases since the year 1952 in which injunctions have been granted or denied against labor unions, and in none of said cases did the case come on for trial on final hearing. Said cases are as follows:

TEMPORARY INJUNCTION GRANTED RESTRAINING ALL PICKETING AND OR ENTIRE STRIKE

(Said cases were filed during the two year periods of time set forth under the word "DATE".)

Style	Case No.	Book No.	Page No.	Date
The Jordan Co., vs. Local Union No. 225 United Brotherhood of Carpenters and Joiners of America.	A-90561	S-8	526	1960-61
Morgan Plumbing & Heating Co., vs. Local 72, Plumbers Union.	A-77975	K-8	588	1960-61
The Dickey Construction Co., vs. Local 72, Plumbers Union.	A-79492	L-8	546	1960-61
H. W. Ivey Construction Co., Inc., vs. Local 72, Plumbers Union.	A-90468	S-8	434	1960-61
R. L. Eskew Contracting Co., vs. Local 613, Electrical Workers Union.	A-73411	H-8	706	1958-59
R. L. Eskew Contracting Co., vs. Local 72, Plumbers Union.	A-73635	I -8	18	1958-59
Perry Printing Process Co., vs. Local 72, Plumbers Union.	A-74953	I-8	678	1958-59
Maple Drive Investment Corp., v. Local 85, Sheet Metal Workers Union.	A-68334	E-8	567	1958-59
Huckabee Transport Corp., vs. Local 728, Teamsters Union.	A-73591	H-8	796	1958-59
F. N. Thompson, Inc., vs. District Council No. 38 and Local No. 193, Printers Union.	A-68018	E-8	409	1958-59

Style	Case No.	Book No.	Page No.	Date
H. W. Ivey Construction Co., Inc., vs. Local 438, Laborers Union.	A-68595	E-8	698	1958-59
The Bonny Corporation vs. Local 438, Laborers Union.	A-76808	K-8	4	1958-59
H. W. Ivey Construction Co., vs. Local 438, Laborers Union.	A-76809	K-8	13	1958-59
Johnson Freight Lines, Inc., vs. Local 728, Teamsters.	A-68453	E-8	698	1958-59
Dixie Ohio Express, Inc., vs. Local 728, Teamsters Union.	A-68454	E-8	698	1958-59
Ryder Truck Lines, Inc., vs. Local 728, Teamsters Union.	A-77184	K-8	192	1958-59
Maple Drive Investment Corp., vs. Local 926, Operating Engineers.	A-68505	E-8	653	1958-59
Maple Drive Investment Corp., vs. Local 438, Laborers Union.	A-68596	E-8	698	1958-59
Georgia Utility Construction Co., vs. Local 72, Plumbers; Local 438, Laborers Union; and Local 926, Operating Engineers Union.	A-63539	B-8	570	1956-57
Campbell Coal Co., vs. Local 859, Teamsters Union; Local 926, Operating Engineers; Local 438, Laborers Union.	A-54285	V-7	743	1956-57
Loo Mac Freight Lines, Inc., vs. Local 728, Teamsters Union.	A-56267	X-7	134	1956-57
The Thomas Pipe Line Co., Inc., vs. Local 225, Carpenters Union.	A-57717	Y-7	58	1956-57

Style	Case No.	Book No.	Page No.	Date
H. W. Ivey Construction Co., vs. Bricklayers and Masons Union No. 8 of Georgia.	A-51320	V-7	60	1954-55
Atlanta Steel Erectors, Inc., vs. Local 859, Teamsters Union.	A-47283	R-7	442	1954-55
George's Pick-Up and Delivery Service vs. Local 728, Teamsters Union.	A-49028	S-7	51	1954-55
Lance Roofing Co., Inc., vs. Local 136, United Slate Tile & Composition Roofers Union.	A-49087	S-7	44	1954-55
F. A. Nart Mfg. Co., vs. Local 122, Ladies Garment Workers Union.	A-44558	P-7	679	1954-55
Lockheed Air Craft Corp., vs. Local 438, Laborers Union.	A-33165	I-7	583	1952-53
Southern Bell Telephone & Telegraph Co., vs. Local 10-322, Communications Workers Union, et al.	A-29643	G-7	422	1952-53

INJUNCTION GRANTED RESTRAINING OR LIMITING PICKETING CONDUCT

Style	Case No.	Book No.	Page No.	Date
Southern Airways, Inc., vs. Airline Pilots Association International.	A-81199	M-8	600	1960-61
McGregor & Werner, Inc., vs. Atlanta Bookbinders and Bindery Women's Union Local No. 96, International Brotherhood of Bookbinders, AFL - CIO.	A-88153	R-8	77	1960-61

Style	Case No.	Book No.	Page No.	Date
Aero Corporation vs. Atlanta District Lodge 46, Machinsts AFL - CIO.	A-85468	P-8	334	1960-61
John W. Burdette vs. Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL - CIO, Local No. 732.	A-88083	R-8	42	1960-61
Golian Steel and Iron Co., vs. Shopmen's Local 616, Iron Workers, AFL -, CIO.	A-75089	I-8	745	1958-59
Atlantic Steel Co., vs. Local 2401, Steel Workers Union.	A-70517	G-8	59	1958-59
Pleasure Togs, Inc., vs. Local 122, Ladies Garment Workers Union.	A-60484	Z-7	64	1956-57
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Pittsburgh Plate Glass Co. vs. Local Union 193 and District Council No. 38, Painters Union; Atlanta Bldg., and Construction Trades Council.	A-40342	N-7	171	1952-53

/s/ Thomas L. Carter, Jr.
Thomas L. Carter, Jr.

Sworn to and subscribed before me, this 21st day of March, 1962.

/s/ Lillian C. Ray
Notary Public, Georgia State at Large
My Commission Expires Jan. 16, 1963

PART OF BRIEF TO SUPREME COURT OF GEORGIA

The fact that the employees working for the Plaintiff in Error are not shown to be represented by the Defendant in Error certainly does not prohibit the Defendant in Error from publicizing this flagrant breach of contract.

In the case of *American Federation of Labor vs. Swing*, 312 U.S. 321, 61 S.Ct. 568, the Supreme Court of the United States had occasion to pass upon the question of whether a State could enjoin picketing where the Union is not the collective bargaining representative of the majority of the employer's employees. The Supreme Court of the United States stated:

> "All that we have before us then is an instance of 'peaceful persuasion' disentangled from violence and free from 'picketing en masse or otherwise conducted' so as to occasion 'imminent and aggravated danger.' Thornhill vs. Alabama, 310 U.S. 88, 105, 60 S.Ct. 736, 746, 84 L.Ed. 1093. We are asked to sustain a decree which for purposes of this case asserts as the common law of a State that there can be no 'peaceful picketing or peaceful persuasion' in relation to any dispute between an employer and a trade union unless the employer's own employees are in controversy with him.
>
> Such a ban of free communication is inconsistent with the guarantee of freedom of speech."

In the case of *Mason and Dixon Lines, Inc., vs. Odom et al*, 193 Ga. 471, 18 S.E. 2d 841, the Court, in ruling that an injunction could not issue, quoted with approval from the case of *American Federation of Labor vs. Swing*, supra, as follows:

> "In American Federation of Labor, John Fitzpatrick, Chicago Federation of Labor v. Swing, 312 U.S. 321, 61 S.Ct. 568, 569, 85 L.Ed. 855, the Supreme Court stated the question before it as follows: 'Is the constitutional guarantee of freedom of discussion infringed by the common law policy of a State forbidding resort to peaceful persuasion through picketing merely because there is no immediate employer-employee dispute?' The Court, in its decision, said: 'Such a ban of free communication is inconsistent with the guarantee of freedom of speech. That a State has ample power to regulate the local problems thrown up by modern industry and to preserve the peace is axiomatic. But not even these essential powers are unfettered by the requirements of the Bill of Rights. The scope of the Fourteenth Amendment is not confined by the notion of a particular State regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the State. A State cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed to him. The interdependence of economic interest of all engaged in the same industry has become common-

> place. American Foundries vs. Tri-City Council, 257 U.S. 184, 209, 42 S.Ct. 72, 78, 66 L.Ed. 189, 27 A.L.R. 360. The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ. Communication by such employees of the facts of a dispute, deemed by them to be relevant to their interests, can no more be barred because of concern for the economic interests against which they are seeking to enlist public opinion than could the utterance protected in Thornhill's case.' "

Of course, the right of the Defendant in Error to picket in this situation is even stronger than that in the Mason and Dixon Lines case or in the case of American Federation of Labor vs. Swing. In the case at bar it is the elected representatives of theh party engaging in the picketing which has consummated the contract and the contract is being performed by theh expenditure of money paid into the City Treasury by the taxpayers, including those picketing. Furthermore, in the case at bar a contractual obligation was being flagrantly violated. If the picketing Union in the Mason and Dixon case had such an interest as to justify the picketing it is a great deal more apparent that the picketing Union in the case at bar is exercising a constitution protected freedom of speech concerning a matter in which it has a most direct interest.

Had the picket sign spoken an untruth it might possibly have been enjoined; however, there was no contention made in the hearing below that there was anything untrue upon the sign. It was stipulated that said language appeared in the contract and it was not disputed that the employer was violating the contract.

There mere fact that the employer may have suffered some damage because of the advertising of its breach of contract does not make the picketing enjoinable. This Court as well as the Supreme Court of the United States has constantly held that picketing is an inviolate right unless it is done for an illegal purpose.

In the case of *Local Union No. 3871, United Steel Workers of America et al VS. Fortner et al.*, 202 Ga. 206, 42 S.E. 2d, 734, this Court held:

> "Peaceful picketing is a form of speech that cannot be abridged."

This Court held in the case of *Cook vs. Huckabee Transport Corporation*, 215 Ga., 9, as follows:

> "Peaceful picketing is not unlawful unless it is for an illegal purpose. On the contrary, it is authorized under the Constitutional guarantee of free speech."

It is, therefore, apparent that the Defendant in Error was merely exercising its Constitutional rights in publicizing what its own elected representatives were doing with its own tax money.

Aside from the Constitutional issue of freedom of speech, it is respectfully submitted that to have granted the injunction under the facts in this case would have been to infringe upon an area protected by the United States Government through enactment of the National Labor Relations Act Title 29, Section 141, et seq., United States Code Annotated. The stipulation of the parties as to interstate commerce establishes that the employer purchased raw materials, equipment and supplies in a value in excess of $50,000.00 and shipped to said project in Atlanta, Georgia, from points beyond the State of Georgia. The Plaintiff in Error, therefore, meets the National Labor Relations Board's standards for the assumption of jurisdiction.

In the case of *Weber vs. Anheuser Busch, Inc.*, 348 U.S. 468, the Supreme Court of the United States held:

> "1. The Court has ruled that a State may not prohibit the exercise of rights which the Federal Acts protect. Thus, in Hill vs. Florida, 325 U.S. 538, 16 LRRM 734, the State enjoined a labor union from functioning until it had complied with certain statutory requirements. The injunction was invalidated on the ground that the Wagner Act included a 'federally established

right to collective bargaining' with which the injunction conflicted. 'International Union v. O'Brien , 339 U.S. 454, 26 LRRM 2082, involved the strike-vote provisions of a state act which prohibited the calling of a strike until a specific statutory procedure had been followed. The state act was held to conflict not only with the procedure and other requirements of the Taft-Hartley strike provisions but also with the protection afforded by Sec. 7 of that Act. In Amalgamated Association vs. Wisconsin Employment Relations Board, 340 U.S. 383, 27 LRRM 2385, the state court issued an injunction under a statute which made it a misdemeanor to interrupt by strike any essential public utility services. It was held that the state statute was invalid in that it denied a right which Congress had guaranteed under Sec. 7 of the Taft-Hartley Act—the right to strike peacefully to enforce union demands for wages, hours and working conditions. Last Term the Court noted in Garner v. Teamsters Union, 346 U.S. 485, 499, 33 LRRM 2218, that

'The detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. For the policy of the National Labor Management Relations Act is not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing. For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state

were to declare picketing free for purposes or by methods which the federal Act prohibits.' "

Aside from the protection granted by the National Labor Relations Act, the subject of this cause has been preempted by enactment of the National Labor Relations Act. In the case of *Meat Cutters vs. Fairlawn Meats, Inc.*, 353 U.S. 20, Supreme Court of the United States, the Court said:

> ". . . The conduct here restrained—an effort by a Union not representing a majority of his employees to compel an employer to agree to a union shop contract, is conduct of which the National Act has taken hold. Sec. 8(b)(2) 61 Stat. 141, U.S.C., Sec. 158 (b)(2).. *Garner v. Teamsters Union*, supra, teaches that in such circumstances a State cannot afford a remedy parallel to that provided by the Act."

Also, see *Building Trade Council v. Garmon*, 353 U.S. 26; *Garner vs. Teamsters Union*, 346 U.S. 161, and *Hotel Union vs. Sax Enterprises, Inc.*, 79 Sup. Court, 273.

To summarize, it is respectfully submitted that the facts in this case clearly establish that the picketing resulted from the breach by the Plaintiff in Error of a provision of its contract with the elected representatives of the parties engaged in the picketing, which contract provision was incorporated in the contract for the protection of the wage standards of all of labor, and in engaging in said picketing the Defend-

ant in Error was merely exercising its rights as an American citizen to publicize what was being done with its own tax money by its own elected Officials. The exercise of this right is fundamental to the Constitutional guarantees of American freedom. In view of the facts of this case it cannot possibly be said that the Trial Court has clearly abused its discretion.

It is, therefore, respectfully submitted that the decision of the Trial Court should be sustained.

Respectfully submitted,

POOLE, PEARCE & HALL
BY: /s/ Edwin Pearce
Edwin Pearce

/s/ John S. Patton
John S. Patton,

Attorneys for Defendant in Error.

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CERTIFICATE OF SERVICE

I hereby certify that I have served five copies of the above Petition for Writ of Certiorari, as required by law, upon Counsel for Defendant in Certiorari, by mailing same, by Registered Mail, on the 2nd day of April, 1962.

John S. Patton

John S. Patton
Of Counsel for Petitioner
in Certiorari.

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Supreme Court of the United States

No. [illegible]
1962

LOCAL No. 438 CONSTRUCTION & GENERAL LABORERS' UNION, AFL-CIO,
Petitioner,

versus

S. J. CURRY, C. D. McKNIGHT, JR., E. G. HIGHTOWER and J. E. TAPPAN, DOING BUSINESS AS S. J. CURRY & COMPANY, A PARTNERSHIP,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of Georgia.

BRIEF ON BEHALF OF S. J. CURRY, ET AL., RESPONDENT.

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and
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SUPREME COURT OF THE UNITED STATES.

No. 839.

LOCAL No. 438 CONSTRUCTION & GENERAL LABORERS' UNION, AFL-CIO,

Petitioner,

versus

S. J. CURRY, C. D. McKNIGHT, JR., E. G. HIGHTOWER and J. E. TAPPAN, DOING BUSINESS AS S. J. CURRY & COMPANY, A PARTNERSHIP,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of Georgia.

BRIEF ON BEHALF OF S. J. CURRY, ET AL., RESPONDENT.

I.

THE PETITIONER'S WRIT OF CERTIORARI SHOULD BE DENIED.

The petition for certiorari seeks to have this Court review a judgment of the Supreme Court of Georgia which reversed an interlocutory judgment or order of Fulton County Superior Court. The judgment of the Supreme Court of Georgia in reversing the trial court

has in effect returned the case to the lower court for such further disposition as may be proper under the pleadings. The case now stands on the trial docket of Fulton Superior Court for final trial. There is, therefore, no final judgment in the case such as would give this Court jurisdiction to entertain a petition for writ of certiorari.

This Court has previously ruled clearly and concisely that a case such as the instant case is not ripe for review by virtue of a writ of certiorari and has stedfastly denied such writ except in some few cases where certiorari has inadvertently been granted. There is perhaps no clearer expression of the position of this Court to be found on the subject, than in the case of *Montgomery Building & Construction Trade Council, et al., petitioners vs. Ledbetter Erection Company, Inc.* reported in 344 U. S. 178, 97 L. Ed. 204 and 73 S. Ct. 196. Judge Minton, in speaking for a seven member majority and in determining whether a judgment on an interlocutory order from the Supreme Court of Alabama was a final decree subject to review, pointed out on page 180 of that decision:

> "From the earliest days, this Court has refused to accept jurisdiction of interlocutory decrees, such as is involved in this case. In Gibbons v. Ogden (US) 6 Wheat 448, 5 L ed 302, the first case presenting this issue to this Court, an injunction had been granted by a Chancery Court of the State of New York. The defendant answered and moved to dissolve the injunction. The court denied the motion to dissolve and the defendant appealed to

the Court for the Trial of Impeachments and Correction of Errors which affirmed.

The appeal to this Court was dismissed because there was no final decree in the court of last resort for this Court to review.

The provision of §1257 that only 'Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . .' has been carried in almost identical language since the Judiciary Act of 1789, 1 Stat 85, §25.

'This requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system.' Radio Station WOW v. Johnson, 326 US 120, 124, 89 L ed 2092, 2097, 65 S Ct 1475.

The distinction between a preliminary or temporary injunction and a final or permanent injunction was elementary in the law of equity. The classical concept was at once recognized and applied in Gibbons v. Ogden (US) supra. There is no room here for interpretation. The rule remains unchanged."

In response to the argument of petitioner that to wait the outcome of the final hearing would be but to moot the question and to frustrate the picketing, Judge Minton further said on page 181 of that decision:

"It is argued that if this is not held to be a final decree or judgment and decided now, it may never be decided, because to await the outcome of the final hearing is to moot the question and to frustrate the picketing. However appealing such argu-

ment may be, it does not warrant us in enlarging our jurisdiction. Only Congress may do that. Furthermore, the interlocutory decree could have been readily converted into a final decree, and the appeal could have proceeded without question as to jurisdiction just as effectively and expeditiously as the appeal from the interlocutory injunction was pursued in this case.

Since there was no final judgment of the Supreme Court of Alabama for review, the writ of certiorari must be dismissed as improvidently granted."

The reasoning of Justice Minton in the *Montgomery* case, *supra*, remains sound and is certainly applicable to the facts presently before the Court under petitioner's writ. Notwithstanding any contentions by the petitioner that the interlocutory order in the instant case is a final order for all purposes and intentions, the fact remains that this Court is being asked to review nothing more than an interlocutory order or judgment and that the case has not been finally disposed of within the meaning of 28 U. S. C. §1257. See also *American Federation of Labor vs. Swain*, 312 U. S. 321, 85 L. Ed. 855, 61 S. Ct. 568; *Gibbons vs. Ogden*, (US) 6 Wheat 448, 5 L. Ed. 302; and *Moses vs. Mobile*, (US) 15 Wall 387, 21 L. Ed. 176.

In recognition of the prior rulings of this Court and in an attempt to evade such decisions, the petitioner has incorporated into its brief an affidavit which purports to demonstrate that over the past ten years not a single application for an interlocutory injunction was ever processed to a final hearing in Fulton Superior

Court. However, even assuming that this Court could properly consider such *aliunde* evidence, the fact remains that the present case remains undisposed of in the trial court and stands ready for trial when called for final hearing. It might also be pointed out in passing that the petitioner itself has a plea in abatement pending in the trial court which has not been disposed of and, further, that although the judgment of the Supreme Court of Georgia has been made the judgment of the lower court, no order has ever been entered restraining the conduct of petitioner. Thus, the instant case has not reached that degree of finality that would make it subject to review by this Court under the writ of certiorari.

II.

THE SUPREME COURT OF GEORGIA DID NOT ERR IN FINDING THAT THE CONDUCT OF PETITIONER HAD VIOLATED THE RIGHT TO WORK STATUTES OF THAT STATE.

The Supreme Court of Georgia in the decision below, which is reported in 217 Ga. 512, and also in 123 S. E. 2d 653, found by the undisputed evidence of the record that at the time of the placing of the picket in question the respondent had no labor dispute with its employees and further that the petitioner was not representing any employee of the respondent. The Court further found that the petitioner had chosen to use a method of imparting information to the public which it knew would have the effect of paralyzing the respondent's operation and thus preventing them from completing

their contract within the time limit provided by its terms and also forcing the respondent to discharge a number of their employees. The Supreme Court of Georgia found that the facts of this case were similar to the case of *Powers vs. Courson*, 213 Ga. 20 (96 S. E. 2d 577) and demanded a finding that the picket was placed on the job by the petitioner for the purpose of forcing the respondent to employ only union labor or to be unable to comply with the terms of their contract because of the refusal of members of other unions employed on the same construction site to cross the picket line and thereby bringing the project to a virtual standstill. Having found these facts from the record, the Supreme Court of Georgia then concluded that the picketing was for unlawful purposes and clearly a violation of the provisions of the Annotated Code of Georgia, 1933, §54-804 and §66-9906.

The Court's attention is invited to that portion of the record which reflects the affidavits of S. J. Curry and B. L. Humphreys, Jr. (transcript Exhibits A and B), which affidavits unequivocally state that a demand was made to hire union workers on this particular job and after a refusal to do so, the union stated that they would use every means at their disposal to see that union workmen were used on this job. There was no evidence introduced by the petitioner at the interlocutory hearing in Fulton Superior Court to contradict the statements of Curry and Humphreys, except some general statement that the right to work statutes of the State of Georgia had not been violated, which of course was a mere conclusion on the part of the affiant. It is

respectfully submitted that the Supreme Court of Georgia's judgment was well supported by the evidence in the record; and the circumstances set forth in the opinion of that Court afford a rational basis for the inference it drew concerning the purpose of the picketing. In this connection see *Ellis, et al. vs. Parks*, 212 Ga. 540, 93 S. E. 2d 708; *Woodward, et al. vs. Collier, et al.*, 212 Ga. 239 (78 S. E. 2d 526) and *Powers vs. Courson, et al.*, 213 Ga. 20 (96 S. E. 2d 577); also *Local Union No. 10, United Association of Journeymen, Plumbers and Steamfitters of the United States and Canada of the AFL, et al. vs. O. J. Graham*, 345 U. S. 192, 97 L. Ed. 946, 73 S. Ct. 585.

III.

THE JUDGMENT OF THE SUPREME COURT OF GEORGIA WAS NOT AN INFRINGEMENT UPON ANY RIGHT GUARANTEED TO THE PETITIONER BY VIRTUE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

That the State of Georgia may enjoin peaceful picketing, consistent with the constitutional guarantees of the Constitution of the United States, when such picketing is carried on for purposes which conflicts with the right to work statutes of the State of Georgia is a proposition which has been well settled by this Court. In this connection see *Local Union No. 10, United Association of Journeymen, Plumbers and Steamfitters of the United States and Canada of the AFL, supra; Building Service Employees International Union vs. Gazzam*, 339 U. S. 532, 94 L. Ed. 1045, 70 S. Ct. 784; *International Brother-*

hood of Teamsters C. & W. H. Union vs. Hanke, 339 U. S. 470, 94 L. Ed. 995, 70 S. Ct. 773; *International Brotherhood of Teamsters Local 695, AFL, et al. vs. Vogt, Inc.*, 354 U.S. 284, 1 L. Ed. 2d 1347, 77 S. Ct. 1166.

IV.

CONCLUSION.

It is, therefore, respectfully submitted that the writ of certiorari should be denied for the reason that there is no final order or judgment ripe for review by this Court and for the further reason that the Supreme Court of Georgia has committed no error in the application of the right to work statutes of that state to the facts in the instant case nor has the Supreme Court of Georgia, by virtue of its decision, abridged any rights guaranteed to the petitioner under the Fourteenth Amendment of the Constitution of the United States.

Respectfully submitted,

By .....
H. H. PERRY, JR.,

and

By .....
ROBERT B. LANGSTAFF,
Attorneys for Respondent in Certiorari.

PERRY, WALTERS & LANGSTAFF,
P. O. Box 747,
Albany, Georgia.

I do hereby certify that I have this day served the petitioners in the within case with copies of the foregoing brief of respondent, by mailing a copy of the same to Mr. Edwin Pearce and Mr. John Patton, 1642 Bank of Georgia Building, Atlanta 3, Georgia, they being attorneys of record for petitioners.

All of this on the ..... day of April, 1962.

ROBERT B. LANGSTAFF.

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 87

LOCAL NO. 438 CONSTRUCTION & GENERAL LABORERS' UNION, AFL-CIO,

Petitioner,

VS.

S. J. CURRY, C. D. McKNIGHT, JR., E. G. HIGHTOWER AND J. E. TAPPAN, d/b/a S. J. CURRY & COMPANY, a Partnership,

Defendant.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

BRIEF OF PETITIONER

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COMMERCIAL RECORDER, FORT WORTH, TEXAS—8-21-62—55

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IN THE

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Defendant.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

BRIEF OF PETITIONER

Petitioner filed Petition for Certiorari to the Supreme Court of the State of Georgia from an opinion and decision of the Supreme Court of said State. The decision of the Supreme Court of the State of Georgia

reported in 123 S.E., 2d 653, 217 Ga. 512, overruled the Superior Court of Fulton County, Georgia, and granted a temporary injunction enjoining Petitioner in Certiorari from engaging in picketing of Defendant in Certiorari.

GROUNDS UPON WHICH JURISDICTION IS INVOKED

The Opinion and Order of the Supreme Court of the State of Georgia from which certiorari was prayed was filed January 4, 1962, and Petition for Certiorari was filed April 3, 1962. Certiorari was granted by the United States Supreme Court on the 21st day of May, 1962, as authorized by 62 Stat. 922(3), 28 U.S.C.A. 1257(3).

The subject matter of this cause has been preempted as well as protected by the United States Government by enactment of the National Labor Relations Act. Title 29, Sec. 141 et seq. U.S.C.A. and the Supreme Court of the State of Georgia had no jurisdiction of this cause.

STATUTES WHICH ARE INVOLVED

Title 29, Section 157, United States Code Annotated, U.S.C. Page .....: 49 Stat. 452, 61 Stat. 140.

"Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representa-

tives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining, or other mutual aid or protection, and shall also have the right to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 158(a)(3) of this title."

Title 29, Section 158(b), United States Code Annotated, U.S.C., page : 49 Stat. 452, 61 Stat. 140, 65 Stat. 601, 73 Stat.525, 542, 545.

"It shall be unfair labor practice for a labor organization or its agents:

"(1) To restrict or coerce (A) employees in the exercise of the rights guaranteed in Section 157 of this title; Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employee in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

"To cause or attempt to cause an employer to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and

the initiation fees uniformly required as a condition acquiring or retaining membership;"

The Statute referred to by the State Supreme Court in its opinion, Section 54-804 of the Code of the State of Georgia, Acts 1947, pages 620, 621, is as follows:

> "COMPELLING PERSONS TO JOIN, OR REFRAIN FROM JOINING LABOR ORGANIZATION, OR TO STRIKE OR REFRAIN FROM STRIKING.—It shall be unlawful for any person, acting alone on in concert with one or more other persons to compel or attempt to compel any person to join or refrain from joining any labor organization, or to strike or refrain from striking against his will, by any threatened or actual interference with his person, immediate family, or physical property, or by any threatened or actual interference with the pursuit of lawful employment by such person, or by his immediate family. (Acts 1947, pp. 620, 621.)"

The Section of the Code of the State of Georgia to which the Supreme Court of Georgia made reference, being Section 66-9906, Acts 1887, page 107, is as follows:

> "UNLAWFULLY PREVENTING LABORERS, ETC., FROM PERFORMING DUTIES.—Any person or persons, who, by threats, violence, intimidation, or other unlawful means, shall prevent or attempt to prevent any person or persons

from engaging in, remaining, or performing the business, labor, or duties of any lawful employment or occupation, shall be guilty of a misdemeanor. (Acts 1887, p. 107.)"

QUESTIONS PRESENTED FOR REVIEW

This Court in granting Petition for Certiorari stated the questions to be reviewed by this Court to be as follows:

(1) Was the decision of the Supreme Court of the State of Georgia from which certiorari was granted by the Supreme Court of the United States a final judgment from which the Supreme Court of the United States could properly grant certiorari?

(2) Did the Supreme Court of Georgia err in holding that it was illegal for the Petitioner to carry a placard in front of the construction job containing the statement: "S. J. Curry & Company, Inc., violating contract with City of Atlanta by not paying wages conforming with those of similar type of work in the Atlanta area. Construction & General Laborers' Union 438, AFL - CIO."? The Court so held. notwithstanding the fact that the Court found that the legend carried upon said sign was true and that S. J. Curry & Company was not paying the prevailing wage in the area even though it had executed a contract with the City of Atlanta for said construction which contract contained the provision: "Wages

will conform with those being paid on similar types of work in the Atlanta area."?

(3) In granting said injunction, said court deprived Petitioner in Certiorari of rights protected by the National Labor Relations Act, Title 29, Section 157 of the United States Code Annotated?

(4) In granting said injunction said court assumes jurisdiction of a cause, the subject matter of which had been pre-empted by enactment of the National Labor Relations Act, Title 29, Section 157-158 (b) of the United States Code Annotated?

STATEMENT OF THE CASE

The undisputed evidence established that the City of Atlanta entered into a contract with the Defendant in Certiorari, S. J. Curry, C. D. McKnight, Jr., E. G. Hightower and J. E. Tappan, doing business as S. J. Curry & Company, a partnership, for construction of a sewage disposal plant known as the South River Sewage Disposal Plant, located in the City of Atlanta, Georgia. It was stipulated that the Defendant in Certiorari during the twelve months immediately preceding the filing of this action purchased raw materials, equipment and supplies in a value in excess of $50,000.00, which were purchased and shipped from points beyond the State of Georgia to points within the State of Georgia. (Tr. page 6.) Said contract contained the following language: "Wages will conform with those being paid on similar types of work

in the Atlanta area". (Tr. page 6.) It was undisputed that the Defendant was paying substantially less than the prevailing wage for such types of work in the Atlanta area. (Tr. Exhibits E, F, G, H, I, J; Tr. pages 19, 20, 23, 24, 26, 27, 28, 29.) It was not disputed that no picketing resulted until six or seven months after a conference with Defendant in Certiorari and not until after the Petitioner made repeated and constant efforts to prevail upon the City of Atlanta to enforce its contract and to require the Defendant to pay the prevailing wage in the area. Several conferences were held with Mr. Jack Savage, the City Attorney of the City of Atlanta, in an effort to have this contract enforced, and a hearing was held before the Board of Aldermen of the City of Atlanta in which the Petitioner presented its contention that the City should enforce its claim and it was undisputed that the Board of Aldermen entered an order stating: "After a lengthy discussion, this matter was referred to Executive Session where the Committee agreed that there is nothing that the City can legally do so as to make Curry *raise his pay scale*". (Emphasis supplied.) (Tr/ Exh E, F pages 3, 4, 5, 20, 21, 25.) It was only after the constant meetings with the City Attorney and the hearing before the Board of Aldermen had proven without avail, and only after the Board of Aldermen had officially stated that there was nothing they would do to enforce the contract that the Petitioner herein placed a picket sign in front of the construction work being done by the Defendant in Certiorari, thereby advising the employees working for the Defendant and the general public that the

Defendant in Certiorari was paying depressed wages in violation of its contract with the City of Atlanta, and was not enforcing its contract in requiring wages to be paid similar to those paid in the Atlanta area. Said picket sign read as follows: "S. J. Curry & Company, Inc., violating contract with City of Atlanta by not paying wages conforming with those of a similar type of work in the Atlanta area. Construction & General Laborers' Local Union 438, AFL - CIO". (Tr. Exhibit E, pages 3, 4, 5; Exhibit F, page 3.) (Tr. pages 3, 4, 5, 21, 22, 25.)

Defendant in Certiorari filed a petition in the Superior Court of Fulton County, Georgia, praying that the Superior Court of Fulton County, Georgia, issue a temporary restraining order, temporary injunction and permanent injunction restraining the Petitioner from engaging in said picketing. (Tr. page 31.) The matter came on for hearing before the Honorable Claude D. Shaw, Superior Court Judge, on application for temporary restraining order, following which the said Judge denied the application for temporary restraining order. Thereupon, the matter was set for hearing upon temporary injunction, and on the 12th day of September, 1961, the matter came on for hearing before the Honorable Ralph H. Pharr, Superior Court Judge, on application for temporary injunction, at which time the evidence as hereinabove stated was fully presented, and the Honorable Ralph H. Pharr, exercising his equity discretion as Superior Court Judge, found that the Petitioner herein was engaging in picketing for the purpose of publicizing the fact

that the Defendant in Certiorari was not paying the prevailing wage in the Atlanta area, in violation of its contract with the city of Atlanta. Said Judge found in favor of Petitioner in Certiorari, and said application for temporary injunction was denied. (Tr. page 41.)

The Defendant prayed an appeal to the Supreme Court of the State of Georgia, and argument upon said appeal was heard and Briefs filed, whereupon said Court rendered its decision on the 4th day of January, 1962. (Tr. page 41.) Said decision held that the language upon the picket signs was true and that the wages being paid were not those conforming with those wages being paid in the Atlanta area and that said failure to pay said wages constituted a breach of contract, but notwithstanding said findings and the findings that the picketing was entirely peaceful at all times, the Court held that the Trial Court was in error in denying the application for temporary injunction and held that the application for temporary injunction should have been granted. On the 16th day of January, 1962, remittitur issued by the Supreme Court of Georgia and judgment was entered overruling the decision of the Honorable Ralph H. Pharr, Judge of the Superior Court of Fulton County, Georgia, and granting the prayer for temporary injunction. Petition for Writ of Certiorari was prayed to this Court on the 3rd day of April, 1962, and on the 21st day of May, 1962, this Court granted Certiorari. (Tr. page 46.)

At the hearing, both in the Superior Court and the Supreme Court of the State of Georgia, Petitioner in Certiorari in oral argument and in Brief before the Supreme Court of Georgia made the contention that to grant the prayers of the Defendant in Certiorari was to violate rights as protected by the Fourteenth Amendment to the Constitution of the United States and Section 7 of the National Labor Relations Act, Title 29, Section 157 of the United States Code Annotated. The contention was similarly made that the subject matter of said cause had been preempted by the United States Government by enactment of the National Labor Relations Act, Title 29, Section 141 et seq. of the United States Code Annotated.

In reaching this rather surprising result, the Supreme Court of Georgia did the following things:

(1) Deprived the Petitioner of life, liberty or property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, in that said Court deprived the Petitioner of its freedom of speech to publicize by means of peaceful picketing the fact that Defendant in Certiorari was paying depressed wages in violation of its contract and Petitioner's own elected Officials, the Officials of the City of Atlanta, were not enforcing a contract entered into for the benefit of those persons working upon the project and for the benefit of the wage structure of all of labor within the Atlanta area, and that a project being constructed by the tax money of the citizens of Atlanta, including those en-

gaged in picketing, was being expended in violation of the terms of the solemn contract and in such manner as to undermine the wage structure in the Atlanta, Georgia, area.

(2) The Court accepted jurisdiction and issued an injunction in a cause concerning which it did not have jurisdiction of the subject matter of said cause, because of the fact that the subject matter of the said cause had been preempted by the United States Government by enactment of the National Labor Relations Act, Title 29, Section 141 et seq., of the United States Code Annotated.

(3) That the Court, by issuing said temporary injunction restraining said picketing, violated rights of the Petitioner protected by the United States Government by enactment of the National Labor Relations Act, Title 29, Section 141, et seq., United States Code Annotated, and more particularly Section 157 thereof, in that it denied Petitioner in Certiorari the privilege of peacefully engaging in concerted activity to publicize a breach of contract destructive to its members' wages, hours and working conditions.

SUMMARY OF ARGUMENT

This case involves the granting of a temporary injunction by the Supreme Court of the State of Georgia. However, said decision constitutes a final order authorizing this Court to grant certiorari and hear the merits of this cause. It is respectfully submitted

that this Court's action in granting certiorari was correct for the followng reasons:

The issues involved in this cause have been preempted by the United States Government by enactment of the National Labor Relations Act. Furthermore, the action of the State Court constitutes a deprivation of rights protected by the National Labor Relations Act. Therefore, the State Court does not have jurisdiction of the subject matter of this cause and lacks the power to act. Any action of a Court lacking jurisdiction is a complete nullity and nothing happening subsequent to the assumption of jurisdiction can be other than a legal nullity. Therefore, the assertion by a state court of *power* to act in an interlocutory way is final. Whether it has that power may be determined without reference to any further proceedings which may be taken.

It is further submitted that although a temporary injunction in a labor case may be theoretically interlocutory, in actuality it is the final decision in the case. A case in Fulton County, Georgia, does not come on for trial on final judgment until in excess of one year subsequent to the filing of the petition, and in all instances the labor controversy is moot before the case can come on for trial on hearing on final judgment. In the last ten years, forty-six cases have been tried upon application for temporary and permanent injunction, and in every case the temporary injunction hearing was the last proceeding in the case.

and *not a single one* of said forty-six cases over said *ten-year period* of time have gone to final hearing.

The Petitioner in Certiorari was acting entirely legally in engaging in the picketing which was enjoined by the Supreme Court of the State of Georgia. The undisputed evidence clearly established that the defendant in Certiorari was violating a clause of its contract with the City of Atlanta, which contract provided: "Wages will conform with those being paid on similar types of work in the Atlanta area." The Petitioner in Certiorari merely advertised by means of picketing the truthful fact that the Defendant in Certiorari was paying depressed wages in violation of its contract with the City of Atlanta. Construction work is secured by means of competitive bids, and the payment of depressed wages by one company enables said company to underbid those paying the standard wages. The result is a general lowering of wages to compete with the competition. Therefore, the picketing engaged in in this case represented concerted activity of various members of the Petitioner in Certiorari for mutual aid or protection within the meaning of the National Labor Relations Act, Title 29, Section 157, United States Code Annotated. The injunction restraining said picketing granted by the Supreme Court of Georgia, therefore, violated rights protected by the National Labor Relations Act, and the State Supreme Court exceeded its authority in granting said injunction.

The activities engaged in by Petitioner in Certiorari which were enjoined by the Supreme Court of the State of Georgia, are governed by the National Labor Relations Act, Title 29, Section 141 et seq., and the jurisdiction of the subject matter of this cause has, therefore, been preempted by the United States Government, and the Courts of the State of Georgia have no jurisdiction over the subject matter of this cause.

ARGUMENT

This Court unquestionably properly granted Petition for Certiorari notwithstanding the fact that this is an appeal from the granting of a temporary injunction by the Supreme Court of the State of Georgia, for the following reasons:

(1) The issues in this cause have been preempted by the United States Government by enactment of the National Labor Relations Act, Title 29, Section 141 et seq., and more specifically Sections 157 and 158(b) thereof and the Courts of the State of Georgia have no jurisdiction over this cause. The assertion of the State Court of *power* to act in an interlocutory way is final. Whether it has that *power* may be determined without reference to any future proceedings which may be taken.

(2) Although the decision is in theory interlocutory, in actuality it is the final decision in the case. In the last ten years, forty-six cases have been tried upon application for temporary and permanent in-

junction and in *every case* the temporary injunction hearing was the last proceeding in the cause and *not a single one* of said forty-six cases have in the ten-year period of time gone to final hearing.

It is respectfully submitted that any order of a court having no jurisdicton over the subject matter of the cause is a complete nullity. Nothing done subsequent to the decision by the court that it does have such power could in any way alter its lack of jurisdiction or have any effect thereon. Any further proceedings would be equally void and could not in any way touch upon the basic question of whether or not the court had the power to act. The decision by the Court that it does have the power to act is a final decision. Nothing that might happen thereafter, no further proceedings, have any relevance to the question of whether or not the court has basic jurisdiction of the subject matter. The State court would have no more jurisdiction at the close of this cause than the court had when it was originally filed. If the court has no jurisdiction the entire proceeding is a nullity and the Supreme Court of the United States can determine this at any time.

In the case of *Montgomery Building and Construction Trades Council vs. Ledbetter Erection Co.*, (344 U.S., 178, 73 Sup. Ct., 196), Mr. Justice Douglas, with Mr. Justice Black concurring, stated in his dissenting opinion:

"The question presented is the *power* of the state court to issue a temporary injunction in this kind of labor dispute. If petitioners had sought mandamus or another appropriate state writ directed against the judge who issued the temporary injunction, I should have no doubt that it would be a final judgment which we would review. See Bandini Petroleum Co., vs. Superior Court, 284 U.S., 8, 14, 52 S.Ct., 103, 105, 76 L.Ed. 136. Cf. Rescue Army v. Municipal Court, 331 U.S., 549, 565, 67 S.Ct., 1409, 1417, 91 L.Ed. 1666. I see no difference of substance between that case and this. The mischief of temporary injunctions in labor controversies is well known. It is done when the interlocutory order is issued. The damage is often irreparable. The assertion by the state court of *power* to act in an interlocutory way is final. Whether it has that *power* may be determined without reference to any further proceedings which may be taken. Unless the rule of finality is to be purely mechanical, which to date it has not been, see Radio Station WOW v. Johnson, 326 U.S., 120, 124, 65 S. Ct., 1475, 1478, 89 L.Ed. 2092, we should determine now whether the National Labor Relations Act permits a state court to interfere with a labor controversy in a way, which though interim in form, irretrievably alters the status of the dispute or in fact settles it."

Mr. Justice Brandeis, speaking for the full Court in *Myers vs. Bethlehem Ship Building Corporation*,

303 U.S., 41, has laid down a rule of policy which is directly applicable here. We appreciate, of course, that the decision is not decisive, review by this Court of the Circuit Court of Appeals of temporary order and judgments of the Federal District Courts not having the same statutory basis as review of State Court judgments. Nevertheless, the considerations which persuaded the Court in that case to relax its policy of denying review of temporary orders of the Federal District Courts is equally persuasive here, the status of the litigation in that case paralleling the status of the litigation here and similar legal points being at issue. Justice Brandeis stated as follows:

> "The Circuit Court of Appeals should have reversed the decrees for preliminary injunction. It is true that ordinarily the decree of a District Court granting or denying a preliminary injunction will not be disturbed on apepal. But that rule of practice has no implication where, as here, there is an inseparable objection to the maintenance of the suit in point of jurisdiction, and where it clearly appears that the decree was the result of an improvident exercise of judicial discretion."

HEARING UPON APPLICATION FOR TEMPORARY INJUNCTION IS ACTUALLY THE FINAL HEARING IN THE STATE OF GEORGIA

In the State of Georgia the hearing upon the application for temporary injunction is in actuality the final hearing in a labor dispute. In Fulton County, Georgia, a case will not come on for trial upon the

final merits of the controversy within less than one (1) year from the date of the filing of the original petition, (Exhibit 2 to the Petition for Certiorari, Exhibit 1 to this Brief) by which time the controversy is invariably entirely moot, the strike being terminated, the construction project in almost all cases being completed. The only hearing having any possible bearing upon the controversy before said controversy becomes moot is a hearing upon application for temporary injunction. Review of the records of the Superior Court of Fulton County, Georgia, which County encompasses most of the City of Atlanta and is the largest County in the State of Georgia, reveals the fact that beginning in the year 1952 and continuing to date hearing upon application for interlocutory injunction were heard in 46 cases, and not a single one of said cases proceeded to final hearing. The style of said cases and the relief granted is as follows: (Affidavit of Thomas L. Carter, Jr., Exhibit 3 to the Petition for Certiorari, Exhibit 2 to this Brief.)

TEMPORARY INJUNCTION GRANTED RESTRAINING ALL PICKETING AND/OR ENTIRE STRIKE

(Said cases were filed during the two year periods of time set forth under the word "DATE".)

Style	Case No.	Book No.	Page No.	Date
The Jordan Co., vs. Local Union No. 225 United Brotherhood of Carpenters and Joiners of America.	A-90561	S-8	526	1960-61

Style	Case No.	Book No.	Page No.	Date
Morgan Plumbing & Heating Co., vs. Local 72, Plumbers Union.	A-77975	K-8	588	1960-61
The Dickey Construction Co., vs. Local 72, Plumbers Union.	A-79492	L-8	546	1960-61
H. W. Ivey Construction Co., Inc., vs. Local 72, Plumbers Union.	A-90468	S-8	434	1960-61
R. L. Eskew Contracting Co., vs. Local 613, Electrical Workers Union.	A-73411	H-8	706	1958-59
R. L. Eskew Contracting Co., vs. Local 72, Plumbers Union.	A-73635	I-8	18	1958-59
Perry Printing Process Co., vs. Local 72, Plumbers Union.	A-74953	I-8	678	1958-59
Maple Drive Investment Corp., v. Local 85, Sheet Metal Workers Union.	A-68334	E-8	567	1958-59
Huckabee Transport Corp., vs. Local 728, Teamsters Union.	A-73591	H-8	796	1958-59
F. N. Thompson, Inc., vs. District Council No. 38 and Local No. 193, Printers Union.	A-68018	E-8	409	1958-59
H. W. Ivey Construction Co., Inc., cs. Local 438, Laborers Union.	A-68595	E-8	698	1958-59
The Bonny Corporation vs. Local 438, Laborers Union.	A-76808	K-8	4	1958-59
H. W. Ivey Construction Co., vs. Local 438, Laborers Union.	A-76809	K-8	13	1958-59
Johnson Freight Lines, Inc., vs. Local 728, Teamsters.	A-68453	E-8	698	1958-59
Dixie Ohio Express, Inc., vs. Local 728, Teamsters.	A-68454	E-8	698	1958-59
Ryder Truck Lines, Inc., vs. Local 728, Teamsters Union.	A-77184	K-8	192	1958-59

Style	Case No.	Book No.	Page No.	Date
Maple Drive Investment Corp., vs. Local 926, Operating Engineers.	A-68505	E-8	653	1958-59
Maple Drive Investment Corp., vs. Local 438, Laborers Union.	A-68596	E-8	698	1958-59
Georgia Utility Construction Co., vs. Local 72, Plumbers; Local 438, Laborers Union; and Local 926 Operating Engineers Union.	A-63539	B-8	570	1956-57
Campbell Coal Co., vs. Local 859, Teamsters Union; Local 926, Operating Engineers; Local 438, Laborers Union.	A-54285	V-7	743	1956-57
Loo Mac Freight Lines, Inc., vs. Local 728, Teamsters Union.	A-56267	X-7	134	1956-57
The Thomas Pipe Line Co., Inc., vs. Local 225, Carpenters Union.	A-57717	Y-7	58	1956-57
H. W. Ivey Construction Co., vs. Bricklayers and Masons Union No. 8 of Georgia	A-51320	V-7	60	1954-55
Atlanta Steel Erectors, Inc., vs. Local 859, Teamsters Union.	A-47283	R-7	442	1954-55
George's Pick-Up and Delivery Service vs. Local 728, Teamsters Union.	A-49028	S-7	51	1954-55
Lance Roofing Co., Inc., vs. Local 136, United Slate Tile & Composition Roofers Union.	A-49087	S-7	44	1954-55
F. A. Nart Mfg. Co. vs. Local 122, Ladies Garment Workers Union.	A-44558	P-7	679	1954-55
Lockheed Air Craft Corp. vs. Local 438, Laborers Union.	A-33165	I-7	583	1952-53
Southern Bell Telephone & Telegraph Co., vs. Local 10-322, Communications Workers Union, et al.	A-29643	G-7	422	1952-53

INJUNCTION GRANTED RESTRAINING OR LIMITING PICKETING CONDUCT

Style	Case No.	Book No.	Page No.	Date
Southern Airways, Inc., vs. Airline Pilots Association International.	A-81199	M-8	600	1960-61
McGregor & Werner, Inc., vs. Atlanta Bookbinders and Bindery Women's Union Local No. 96, International Brotherhood of Bookbinders, AFL - CIO.	A-88153	R-8	77	1960-61
Aero Corporation vs. Atlanta District Lodge 46, Machinists AFL - CIO.	A-85468	P-8	334	1960-61
John W. Burdette vs. Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL - CIO, Local No. 732.	A-88083	R-8	42	1960-61
Golian Steel and Iron Co., vs. Shopmen's Local 616, Iron Workers, AFL - CIO.	A-75089	I-8	745	1958-59
Atlantic Steel Co., vs. Local 2401, Steel Workers Union.	A-70517	G-8	59	1958-59
Pleasure Togs, Inc., vs. Local 122, Ladies Garment Workers Union.	A-60484	Z-7	64	1956-57
Swift & Co. vs. Local 355, United Packing House Workers Union.	A-61040	A-8	120	1956-57
American Box and Paper Co., vs. Local 8, Printing Pressmen and Assistants Union.	A-49039	S-7	520	1954-55
Parks Garment Co., vs. Local 122, Ladies Garment Workers Union.	A-47129	R-7	365	1954-55
Dixie Wholesale Co., Inc., vs. Local 728, Teamsters Union.	A-50342	T-7	371	1954-55

Style	Case No.	Book No.	Page No.	Date
Metal Arts Mfg. Co. vs. District Lodge No. 46, Fulton Lodge No. 2, Machinists Union.	A-37855	L-7	528	1952-53

TEMPORARY INJUNCTION DENIED

Style	Case No.	Book No.	Page No.	Date
Bill's Delivery Service, Inc., vs. Local 728, Teamsters Union.	A-57531	X-7	766	1956-57
Southern Railway Co., vs. Local Lodge No. 354, Brotherhood of Railway Carmen.	A-57495	X-7	748	1956-57
Pilot Freight Carriers, Inc., vs. Local 312, Teamsters Union.	A-44949	Q-7	75	1954-55
Pilot Freight Carriers, Inc., vs. Local 182, Teamsters Union.	A-44903	Q-7	52	1954-55
Pittsburgh Plate Glass Co. vs. Local Union 193 and District Council No. 38, Painters Union; Atlanta Bldg., and Construction Trades Council.	A-40342	N-7	171	1952-53

It will be observed from the above record that in a full decade only five cases have resulted in a denial of application for injunction, and in not a single case within the last ten years has the matter proceeded beyond the temporary injunction stage.

It will be further noted that all of the cases in which application for injunction was denied were heard in excess of five years ago. Within the last five years a total of 18 temporary injunctions have been granted preventing all picketing and a total of

6 injunctions have been granted restraining or limiting picketing conduct, and in *not a single case* has the application for injunction been denied. The first denial of an application for injunction in the Superior Court of Fulton County in the last five years was the case at bar, which decision was promptly overruled by the Supreme Court of the State of Georgia.

In *none* of said cases over a period of *ten years* did the case ever come on for a final hearing, but the temporary injunction hearing was completely determinative of the cause.

It is respectfully submitted that the purposes of the rule of the Supreme Court of the United States that it will not grant certiorari from a decision at an interlocutory stage of the proceedings below but will grant certiorari from a final judgment only do not have applicably in the situation found in the case at bar. For all practical purposes the interlocutory injunction hearing in the State of Georgia and most particularly in Fulton County, Georgia, the most populace County in the State of Georgia, is the final hearing ever held in a labor relations matter. A total of 46 cases have been held involving applications for temporary injunctions in the labor relations field within the last ten years. In this period of time *not a single case* has gone to hearing upon final application for injunction for the very apparent and important reason that it takes approximately a year, or more for a case to reach the calendar on application for final injunction, and the matters are always moot by the time they could

be heard on application for final injunction. The hearing which determines the rights of the parties and which determines whether the picketing shall continue at such time as it is not moot is invariably the temporary injunction hearing. There is no final hearing in these matters. The temporary injunction hearing is for all practical purposes the final hearing and the only hearing that can have any possible consequences relevant to any of the matters involved in those litigations. For the Court to refuse to hear any case because it is an appeal from a temporary judgment, which injunction will remain in full force and effect until long after the construction project is completed and the dispute is at an end, is to deny to the parties therein absolutely all redress.

The decision of the Supreme Court of the State of Georgia in the case at bar involves a most serious violation of the Bill of Rights as protected against State action by the Fourteenth Amendment to the Constitution of the United States. It constitutes an invasion of the hard won Anglo-Saxon principle of freedom of speech, including the right to criticise any public Official in any truthful, peaceful manner. It also constitutes an invasion by the Courts of the State of Georgia of a field of law preempted by the United States Government by enactment of the National Labor Relations Act, Title 29, Section 141 et seq. There will be no redress at any time in cases of this kind unless relief is granted as prayed.

The case at bar is not an isolated incident of the Supreme Court of the State of Georgia misinterpreting the decisions of the Supreme Court of the United States and assuming jurisdiction of a clearly preempted field. A body of precedent is being established in the State of Georgia, which it is respectfully submitted is inconsistent with the decisions of the Supreme Court of the United States and no redress has been obtainable because of the fact that said cases were always determined at the temporary injunction stage and the cases never reached final hearing.

In the case of *Ellis vs. Parks*, 212 Ga., 540, 93 S. E. 2d, 708, decided July 10, 1956, the Supreme Court of Georgia found that temporary injunction should issue because the union had been found by the United States District Court to be liable in damages under Section 303 of the National Labor Relations Act, Title 29, Section 187 U.S.C.A., for striking for recognition in the face of the certification of another union by the National Labor Relations Board. Said United States District Court case was styled as *Parks vs. Atlanta Printing Pressmen & Assistants' Union*, 150 Fed. Supp., 246, and said case was appealed to the United States Fifth Circuit Court of Appeals, which rendered opinion reported in 243 Fed. 2d, 284. The State Court granted said temporary injunction because of a holdng in said damage suit in Federal Court that the National Labor Relations Act had been violated, the State Supreme Court stating with reference to Federal preemption the following:

"This State has the power to enforce its Constitution and laws in such a case, and the offenders can find no refuge behind the Taft-Hartley Act, 29 U.S.C.A., Section 141, et seq. That law was not intended to protect unlawful conduct."

The case at bar represents a mere extension of the decision of the Supreme Court of the State of Georgia in the case of *Fleming vs. H. W. Ivey Construction Co.*. reported in 215 Ga., 460, 111 S.E. 2d, 97. Ivey Construction Company was the general contractor engaged in construction of a building at the University of Georgia. The Court found in said case that the union had verbal contracts with a sub-contractor on said project, Wren Construction Company, providing that in all construction in the State of Georgia Wren Construction Company would pay an hourly wage of $3.85. On said construction at the University of Georgia, Wren Construction Company only paid the sheet metal workers $3.35 rather than the $3.85 per hour as agreed. The sheet-metal workers erected a picket sign stating that Wren Construction Company was paying less than the union scale. The Court found that it did not definitely appear from the record whether or not the union represented a majority of the employees. The Superior Court granted a temporary injunction and on appeal the Supreme Court of the State of Georgia held that the grant of said injunction was proper. Examination of the said case will reveal that the Supreme Court of Georgia in so deciding held as follows:

1. Since there was no hiring hall required by the contract, the contract was without consideration and unenforceable.

2. That interstate commerce was not involved. The Court so held notwithstanding the fact that the Ivey Construction Company admitted that some of the materials going into said construction were shipped from points beyond the State of Georgia and said case was determined prior to elimination of the "no man's land" in the 1959 Amendments.

3. Since it did not affirmatively appear in the record that the union represented a majority of the employees, although there was no evidence that they did not represent a majority of the employees, the union had no right to publicize the fact that said company was only paying $3.35 an hour, whereas the prevailing union rate was $3.85 per hour.

4. Although the Court held that the picketing was entirely peaceful, it stated: "As stated heretofore by this Court in Ellis vs. Parks, 212 Ga., 540, 93 S. E. 2d, 708, the State has the power to enforce its Constitution and Laws and the mere fact that the Federal Government has enacted legislation to diminish the cause of labor disputes threatening or obstructing interstate and foreign commerce in nowise excludes the exercise of the police power of the State."

In the said case the Court stated:

"Where there is any evidence to support the ruling of the lower court the discretion of the trial judge will not be controlled in the grant or denial of a temporary injunction. Thus, this court cannot hold that there was an abuse of discretion here. See Log Cabin Steak Co., vs. Burton, 212 Ga., 648, 94 S.E. 2d, 694, and cases cited therein; Woodward vs. Collier, 210 Ga., 239, 78 S.E. 2d, 526, supra; Ellis vs. Parks, 212 Ga., 540, 93 S. E. 2d, 908, supra."

This principle of law was neither mentioned nor applied in the case at bar in which case the trial court had held that injunction should not issue.

It is, therefore, respectfully submitted that the Supreme Court of the State of Georgia has consistently misinterpreted the decisions of the Supreme Court of the United States both on the subject of Federal preemption and on the question of freedom of speech under the Fourteenth Amendment to the Constitution of the United States. Due to the fact that said decisions arise at the temporary injunction state and *without exception* never proceed beyond that stage all of labor throughout the State of Georgia is completely without redress.

Of course, for every case carried to the State Supreme Court there are great numbers of cases in which the trial courts have granted injunctions based on said precedents set by the Supreme Court of the State of Georgia.

The effect of the decisions of the State Supreme Court is quite evident from the fact that in the last 5 years 24 injunction cases have been heard on temporary injunction hearings in Fulton County, Georgia, and not a single case prior to the case at bar was decided in favor of the Union.

The Court has indicated that the rule of finality is not an absolute one and that the language used by Congress in 1789, in conferring power of review in this Court, will not be applied literally or mechanically. As stated by Mr. Justice Frankfurter in *Radio Station WOW v. Johnson*, 326 U.S., 120, at 124, speaking for the majority of the Court:

> "But even so circumscribed a legal concept as appealable finality has a penumbral area . . . Considerations of English usage as well as those of judicial policy would justify an interpretation of 'final judgment' so as to preclude reviewability here where anything further remains to be determined by a state court, no matter how disassociated from the only Federal issue that has finally been adjudicated by the highest court of the State . . .
>
> "Unfortunately, however, the course of our jurisdictional history has not run as smoothly as such a mechanical rule would make it. To enforce it now, or to pronounce it for the future, would involve disregard of at least two controlling precedents, both of them expressing the views

> of numerous courts, and one of which has stood in our books for nearly a hundred years, in an opinion carrying the authority, especially weighty in such matters, of Chief Justice Taney."

In the eairlier case referred to in the above quoted opinion—*Forgay vs. Conrad*, 6 How. 201, Mr. Chief Justice Taney first indicated a policy of liberally interpreting and applying the requirement of finality as follows:

> "The question upon the motion to dismiss is whether this is a final decree, within the meaning of the Acts of Congress. Unfortunately, it is not final, in the strict, technical sense of that term. But this Court has not heretofore understood the words 'final decrees' in this strict and technical sense, but has given to them a more liberal, and, as we think, a more reasonable construction, and one more consonant to the intention of the Legislature."

Republic Natural Gas Company vs. Oklahoma, 334 U.S., 62, followed *Radio Station WOW v. Johnson*. Mr. Justice Frankfurter, again speaking for the majority, indicated an additional area in which the requirement of finality would not be rigidly applied. In discussing a situation in which review would be premitted even though no technical finality was present, Justice Frankfurter indicated that a rigid application would not be required and that the rule would be relaxed where there existed "any immediate threat

of irreparable damage . . . rendering postponed review so illusory as to make the decree 'final now or never'."

Mr. Justice Rutledge, dissenting in the *Republic Natural Gas Company* case, supra, reviewed the decisions of this Court which abjure a rigid and literal interpretation of the word "final" as appears in Section 1257 of the U. S. Code and concluded as follows:

> "The fact that all phases of the litigation are not concluded does not necessarily defeat our jurisdiction . . . But not every decision by a State court leaving the controversy open to further proceedings and orders is either inconclusive of the issues or premature for purposes of review under Section 237. This appears most recently from the decision in *Radio Station WOW vs. Johnson* which applied a settled line of authorities to that effect. Cf. *Richfield Oil Corp. vs. State Bd. of Equalization*, 329 U.S. 69, 91 L.Ed. 80, 67 S. Ct. 156.
>
> "In such cases the formulation of the test of finality made in the Gospel Army and like decisions has not been followed. Instead that question, in the special circumstances, has been treated as posing essentially a practical problem, not one to be determined either by the label attached to the state court judgment by local law, Richfield Oil Corp., vs. State Bd. of Equalization. (US) supra, or by the merely mechanical inquiry whether some further order or proceeding beyond

> 'the ministerial act of entering the judgment' may be had or necessary after our decision is rendered. Radio Station WOW vs. Johnson, supra (326 US, at 125, 89 L.Ed. 2097, 65 S. Ct. 1475) . . . The section's (1257) policy to furnish full, adequate and prompt review outweighed any design to secure absolute and literal 'finality'."

In considering whether to exercise its jurisdiction to review, this Court has considered substance rather than form and has indicated that the face and form of the judgment is not controlling. *Clark vs. Williard*, 292 U. S., 112, at 118; *Gospel Army vs. Los Angeles*, 331 U. S., 543 at 546.

As stated by Mr. Justice Black in his dissenting opinion in the *Montgomery Building & Construction Trades Council Case, supra.*, "The assertion by the State Court of Power to act in an interlocutory way is final. Whether it has that power may be determined without reference to any future proceeding which may be taken." It is further respectfully submitted that the Montgomery Building & Construction Trades Council case differed from the case at bar in that no showing was made in that case that in no case could a decision be reached on a hearing upon application for permanent injunction. In the case at bar the records of the Superior Court of Fulton County, Georgia, have been completely researched for a *full decade* and in said period of ten years although 46 cases involving injunctions have been processed *not one single case* has ever proceeded to hearing beyond

the so-called temporary injunction stage. It is, therefore, apparent that what the Court is asked to review in this case is actually a final judgment.

Where the State Court lacks jurisdiction everything done by the State Court is a nullity. No pleadings filed or evidence presented can in any way influence or alter that fact. The question as issue is jurisdiction of the Court. If the Court lacks jurisdiction there is no need to determine anything else and all else become superfluous.

In an area where denial of certiorari until all of the null and void proceedings following the assumption of jurisdiction is not utterly destructive of the rights of the parties, the Court could wait until the completion of said void proceedings to grant certiorari. However, were the basic rights of labor and the uniform policy of the United States Government will be utterly thwarted unless certiorari is granted it is respectfully submitted that the Court should not permit such a result to flow from a completely void proceeding.

That the policies of the United States as set forth in the National Labor Relations Act are being completely thwarted is evidenced by the fact that in Fulton County, Georgia, whose population is well in excess of 500,000 people, not a single labor injunction case has gone to hearing on final injunction in the last ten years an no labor union has won a single injunction case in over five years.

There can, therefore, be no doubt that this Court was correct in granting certiorari in this case.

THE ACTIONS OF PETITIONER IN CERTIORARI WERE COMPLETELY LEGAL

It is herewith respectfully submitted that the important and pertinent facts in this cause are without dispute. It is not disputed that the contract between the Defendant in Certiorari and the City of Atlanta contained a provision as follows: "Wages will conform with those being paid on similar types of work in the Atlanta area". It is not disputed and is found by both the Trial Court and the Supreme Court of the State of Georgia that this contract was being violated and that the employees were not being paid the wages being paid for similar type of work in the Atlanta area. It is not disputed and is found both by the Trial Court and the Supreme Court of the State of Georgia that the picketing was at all times peaceful. There is no allegation of any secondary boycott activity or any other violation of law.

The Supreme Court of Georgia states that picketing was a violation of the State's Right To Work Law. However, there is no evidence in this case to sustain such a conclusion. It is found that an officer of another organization in the month of January made a statement to Defendant in Certiorari that the Defendant in Certiorari must employ union labor. However, there is no evidence at all in the record that the Petitioner in Certiorari at any time made any demand relating to who must be employed. Irrespec-

tive of this fact the evidence is undisputed that no action was taken by any union following the conference in January, 1961, and there was no attempt to compel the employer to in any way violate the State Right To Work Law. The Petitioner in Certiorari did concern itself with having the wage rate increased to conform with the normal wage rate in the area and to conform to the rate Defendant in Certiorari had agreed to pay in its contract with the City of Atlanta. The Petitioner in Certiorari exhausted every possible means to have this wage rate raised before publicizing the fact that depressed wages were being paid in violation of said contract. It is completely undisputed that numerous conferences were held with the City Attorney of the City of Atlanta in an effort to have the wage rate as set forth in the contract complied with and the matter was finally carried to the City Board of Aldermen and the Board of Aldermen in their Order as hereinabove quoted made plain that the only request made by the Petitioner in Certiorari was that the wages be increased. It is undisputed that it was made plain to the City Attorney in all of said conferences that the union was making no contention that any person should be discharged or any person hired, but was only seeking to protect the wage structure in the area. Not one word of evidence appears in the record to the effect that there was any attempt made throughout the time of these conferences with the City Attorney and this hearing before the City Board of Aldermen stretching over a period of many months immediately prior to the picketing to compel the employment of union labor, nor was anyone even request-

ed to do so. In view of these facts the Trial Court found that the picketing was for the purpose of publicizing said breach of contract relating to the wage structure and was a protected exercise of freedom of speech and could not be enjoined. On the original application for temporary restraining order another Judge refused temporary restraining order on the same ground. There is no basis in the evidence on the undisputed facts of any finding that the picketing in this cause was for an illegal purpose. The Petitioner in Certiorari showed an unusual amount of patience in exhausting every other method of getting the wage scale increased, and only after six or seven months of persistent futile efforts and only after the City Board of Aldermen had ruled that they would do nothing about the matter did the Petitioner in Certiorari resort to its only remaining redress, which was to call to the attention of the public, including Defendant in Certiorari's employees, the detriment that was being done to the wage structure of labor in the Atlanta area.

The Petitioner is not a group of outsiders or interlopers involving itself in something that does not concern it. The undisputed evidence establishes that most construction projects are given on competitive bids, and that a company paying depressed wages can underbid the companies who are paying the union scale. The result is that those companies paying the union scale will eventually go bankrupt for want of securing successful bids or to prevent such a result must in turn reduce their wages to that of the de-

pressed wage structure of the company not paying the stardard wage. The ultimate result of this cycle is the complete destruction of all of the hard won wage rates won by labor over many years. It was to prevent this result that Petitioner concerned itself with this breach of contract. It is further submitted that Petitioner was not a disinterested outsider because this was not a contract between two private employers, but it was a contract which had been entered into by the City of Atlanta, of which Petitioner is a part. As citizens of the City of Atlanta the Petitioner had a right to concern itself with the actions of the City of Atlanta, particularly when they had a direct bearing upon wages, hours and working conditions, the betterment of which is the primary funetion and purpose of existence of the Petitioner. The funds being expended for construction of this project were being paid out of the City Treasury, which receives its funds entirely from the taxes exacted from the citizens of Atlanta including the members of the Petitioner Union. Therefore, the Petitioner had a very direct and real concern in this breach on contract.

In the case of *American Federation of Labor vs. Swing*, 312 U.S., 321, the Court said:

> "A State cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of eco-

nomic interest of all engaged in the same industry has become a commonplace. American Founderies vs. Tri-City Council, 257 U.S., 184, 209. The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ."

The National Labor Relations Board, in the case of *Plumbers and Pipefitters' Union (Keith Riggs Plumbing & Heating Contractor)* 50 LRRM 1313, 137 NLRB. No. 121, had before it a case for decision in which picketing had been engaged in to publicize a non-union employer's sub-standard wages and working conditions. The Board held:

"A labor union normally seeks to organize the unorganized and to negotiate collective bargaining contracts with employers, but also has a legitimate interest apart from organization or recognition that employers meet prevailing pay scales and employee benefits for otherwise employers paying less than the prevailing wage scale would ultimately undermine the area standards. Indeed the importance of maintaining area standards as a matter of public as well as union interest was long ago endorsed by Congress by its enactment of the Davis-Bacon Act (40 U.S. Code, Section 273-a, et seq.,) relating to public contracts. It has application, of course, whether or not employees of public contractors are organized or have a collective bargaining contract."

It is respectfully submitted that the record is without dispute that the picketing was entirely peaceful, that the Defendant in Certiorari had executed a contract with the City of Atlanta providing that it should pay the prevailing wage in the area; that the Defendant in Certiorari was not paying the prevailing wage in the area, and was, therefore, violating its contract with the City of Atlanta, and that all that the Petitioner in Certiorari was doing was advertising the truthful facts by means of lawful concerted activity. Certainly neither of the Georgia statutes cited by the Court can have any applicability. This action had no relationship to Georgia Section 54-804, which deals with "compelling persons to join or refrain from joining labor organizations or to strike or restrain from striking", and it has no relationship to Georgia Section 66-9906, which provides: "Any person or persons who by threats, violence or intimidation or other unlawful means shall prevent or attempt to prevent any person or persons from engaging in, remaining in, or performing the business, labor or duties of any lawful employment or occupation shall be guilty of a misdemeanor." There was no evidence of any threats, violence, intimidation or other unlawful means. Neither State nor Federal law were in anyway violated, and the actions of the Petitioner in Certiorari constituted protected freedom of speech, which could not be infringed.

THE SUPREME COURT OF GEORGIA DENIED PETITIONER IN CERTIORARI RIGHTS PROTECTED BY THE NATIONAL LABOR RELATIONS ACT

Title 29, Section 157, United States Code Annotated, reads as follows:

> "Employees shall have the right to self organization; to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection and shall also have the right to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 158 (a) (3) of this Title."

The picketing engaged in in this cause represented concerted activity of various members of the Petitioner in Certiorari for mutual aid or protection within the meaning of the above quoted Statute. A group of persons whose wage structure would be utterly destroyed within the area if the action of S. J. Curry & Company and the City of Atlanta persisted were concertedly taking action to bring to the attention of the employees working for Curry and the public generally the fact that their wage structure was being utterly and completely destroyed and that it was being done by means of violation of the contract entered into between Curry and the City of Atlanta.

The Supreme Court of the United States has on numerous occasions held that a State Court cannot prohibit any action which is protected by the National Labor Relations Act. In the case of *Weber vs. Anheuser-Busch, Inc.*, 35 LRRM 2637, 348 U.S. 468, the Supreme Court of the United States said:

> "The Court has ruled that a State may not prohibit the exercise of rights which the Federal Act protects. Thus in Hill vs. Florida, 325 U. S., 538, 16 LRRM 734, the State enjoined a labor union from functioning until it had complied with certain Statutory requirements. The injunction was invalidated on the ground that the Wagner Act included a 'Federally established right to collective bargaining' with which the injunction conflicted. International Union vs. O'-Brien, 339 U.S., 454, 26 LRRM 2082, involved the strike vote provisions of a State Act which prohibited the calling of a strike until a specific Statutory procedure had been followed. The State Act was held to conflict not only with the procedure and other requirements of the Taft-Hartley strike provisions, but also with the protection afforded by Section 7 of that Act. In Amalgamated Association vs. Wisconsin Employment Relations Board, 340 U.S. 383, 27 LRRM 2385, the State Court issued an injunction under a Statute which made it a misdemeanor to interrupt by strike any essential public utility service. It was held that the State Statute was invalid in that it denied a right which Congress had guar-

anteed under Section 7 of the Taft-Hartley Act, the right to strike peacefully to enforce union demands for wages, hours and working conditions. Last term the Court noted in Garner v. Teamsters Union, 346 U. S., 485, 499, that: 'The detailed prescription of a procedure for restraining of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. For the policy of the National Labor Management Relations Act is not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing. For a State to impinge on the area of labor combat designed to be free is quite as much an obstruction of Federal policy as if the State were to declare picketing free for purposes or by methods which the Federal Act prohibits.' "

Also see *General Drivers, Warehousemen & Helpers Local Union 89, et al, vs. American Tobacco Company, Inc.*, 348 U. S., 978, 35 LRRM 2709.

In the case of *Building Trades Council vs. Garmon*, 359 U. S., 236, 43 LRRM 2838, the injunction was granted by the State Court in a case in which the union admittedly did not represent the employees working on the job. The Court said:

"When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by Section 7 of the Taft-Hartley Act or constitute an unfair labor practice under Section 8, due regard for the Federal enactment requires that State jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of Federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by State law. Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed toward the governments of Industrial Relations. Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes."

In the case of *Youngdahl vs. Rainfair, Inc.*, 355 U. S., 131, the Supreme Court said:

"The applicable principles of law ar substantially agreed upon. Respondent concedes that it is engaged in interstate commerce and that its employees are entitled to the protection of the Labor Management Relations Act 1947, 61 Stat., 136, 29 U.S.C. Section 151. Respondent does not contend that the State Court had power to enjoin peaceful organized activity, recognizing that generally the National Labor Relations Board has exclusive jurisdiction of such matters.

Weber vs. Anheuser-Busch, Inc., 348 U.S., 468. Petitioners concede that the State Court had the power to enjoin violence. . . .

". . .

"Accordingly, insofar as the injunction before us prohibits petitioners and others cooperating with them from threatening violence against, or provoking violence on the part of, any of the officers, agents or employees of respondent and prohibits them from obstructing or attempting to obstruct the free use of the streets adjacent to respondent's place of business and the free ingress and egress to and from that property it is affirmed. On the other hand, to the extent the injunction prohibits all other picketing and patrolling of respondent's premises and in particular prohibits peaceful picketing, it is set aside."

THE SUBJECT MATTER OF THIS CASE WOULD BE PREEMPTED EVEN IF THE CONDUCT OF THE PETITIONER IN CERTIORARI CONSTITUTED A VIOLATION OF THE NATIONAL LABOR RELATIONS ACT.

It is respectfully submitted that the actions of the Petitioner in Certiorari in this cause constitute no violation of law, either State or Federal. On the contrary, they constitute a right clearly protected by the National Labor Relations Act. However, even if the actions of the Petitioner in Certiorari were a violation of the National Labor Relations Act they would be

equally preempted and a State Court could not entertain jurisdiction of this cause.

In the case of *Meat Cutters vs. Fairlawn Meats, Inc.*, 353 U. S., 20, the Supreme Court of the United States stated:

> "The conduct here restrained—an effort by a union not representing the majority of his employees to compel an employer to agree to a union shop contract—is conduct of which the National Act has taken hold. Section 8(b)(2) 61 Stat., 141, 29 U.S.C. Sec. 158(b)(2), 29 U.S.C.A., Sec. 158(b)(2). Garner vs. Teamsters etc., Union, supra, teaches that in such circumstances a State cannot afford a remedy parallel to that provided by the Act."

In the case of *Garner v. Teamsters*, 346 U. S., 485, the picket sign read as follows:

> "Local 776 Teamsters Union (AFL) wants employees of General Storage and Transfer Company to join them to gain union wages, hours and working conditions."

The Court held as follows:

> "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and

application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. . . .

". . .

"Further, even if we were to assume, with petitioners, that distinctly private rights were enforced by the State authorities, it does not follow that the State and Federal authorities may supplement each other in cases of this type. The conflict lies in remedies not rights. The same picketing may injure both public and private rights. But when two separate remedies are brought to bear on the same activity, a conflict is imminent."

In the case of *Hotel Employees Union Local 255 vs. Sax Enterprises*, 358 U. S., 270, the Supreme Court held:

"The judgments of the Supreme Court of Florida in these twelve consolidated cases mus

be reversed. They all concern the power of the Courts of Florida to enjoin organizational picketing at twelve Florida resort hotels. After a series of decisions in regard to these and related cases, the Florida Supreme Court in identical per curiam opinions affirmed the issuance of permanent injunctions against the picketing.

"The Florida courts were without jurisdiction to enjoin this organizational picketing whether it was activity protected by Section 7 of the National Labor Relations Act as Amended, 29 U. S. C. Section 157, or prohibited by Section 8(b)(4) of the Act, 29 U. S. C. Section 158(b)(4)."

It is respectfully submitted that the cases of Hotel Employees Union vs. Sax Enterprises, Inc., supra.; Meat Cutters vs. Fairlawn Meats, Inc., 353 U. S. 20; Garner vs. Teamsters, 346 U. S. 485, and Building Trades Council vs. Garmon, 353 U. S. 27, all related to stranger picketing. In none of said cases did the union represent a majority of the employees. In all of said cases the Supreme Court of the United States held that the cause was preempted.

CONCLUSION

It is, therefore, respectfully submitted that this Court properly granted Certiorari, that all that the Petitioner in Certiorari was doing in this case was peacefully publicizing by means of picketing the truthful facts relating to the dereliction of its own elected

representatives to enforce a contract executed by the City of Atlanta and paid for with the tax money of its citizens. In so doing the members of Petitioner in Certiorari were engaging in concerted activity to protect their wage scale within the area, a right fully protected by Section 7 of the National Labor Relations Act, Title 29, Section 157 U. S. C. A. This action was entirely legal and the injunction granted by the Supreme Court of the State of Georgia infringed upon rights protected by the National Labor Relations Act. Furthermore, the subject matter of this cause has been fully preempted by enactment of the National Labor Relations Act, and the Courts of the State of Georgia have absolutely no jurisdiction in this cause.

It is, therefore, respectfully submitted that the Courts of the State of Georgia having no jurisdiction of the subject matter of this cause, the Supreme Court of the United States should overrule the decision of the Supreme Court of Georgia and dissolve the temporary injunction granted by said Court.

Respectfully submitted

POOLE, PEARCE & HALL

BY: Edwin Pearce

Edwin Pearce

John S. Patton

John S. Patton

Attorneys for Petitioner in
Certiorari.

P. O. ADDRESS:
1642 Bank of Georgia Building,
Atlanta 3, Georgia.

* * *

CERTIFICATE OF SERVICE

I hereby certify that I have served ~~a copy~~ 5 copies of the above Brief of Petitioner by mailing ~~a copy~~ 2 copies of same, by registered mail, to Robert B. Langstaff, Attorney at Law, P. O. Box 747, Albany, Georgia, Attorney for Respondents.

This 23rd day of August, 1962.

John S. Patton

John S. Patton

APPENDIX

"EXHIBIT 1."

IN THE

SUPREME COURT OF THE UNITED STATES

LOCAL NO. 438 CONSTRUCTION & GENERAL LABORERS' UNION, AFL - CIO,

VS. Case No. .....

S. J. CURRY, C. D. McKNIGHT, JR., E. G. HIGHTOWER and J. E. TAPPAN, DOING BUSINESS AS S. J. CURRY & COMPANY, A PARTNERSHIP

AFFIDAVIT

GEORGIA, FULTON COUNTY.

I, J. W. SIMMONS, being first duly sworn do hereby make oath that I am Clerk of the Superior Court of Fulton County, Georgia, and that the average time required for a case to come to trial on the final merits in the Superior Court of Fulton County, Georgia, is in excess of one (1) year from the date of the filing of the original petition.

/s/ J. W. Simmons.
J. W. Simmons, Clerk, Superior
Court of Fulton County, Georgia.

Sworn to and subscribed
before me, this 22nd day of March, 1962.

/s/ Estelle U. Roberts,
Notary Public, Fulton County, Georgia.
My Commission Expires June 13, 1965.

(SEAL)

"EXHIBIT 2."

IN THE
SUPREME COURT OF THE UNITED STATES

LOCAL NO. 438 CONSTRUCTION & GENERAL LABORERS' UNION, AFL - CIO,

VS. Case N. .....

S. J. CURRY, C. D. McKNIGHT, JR., E. G. HIGHTOWER and J. E. TAPPAN, DOING BUSINESS AS S. J. CURRY & COMPANY, A PARTNERSHIP.

AFFIDAVIT

GEORGIA, FULTON COUNTY.

I, THOMAS L. CARTER, JR., Attorney, being first duly sworn, hereby solemnly swear that I have carefully searched the records of the Superior Court Clerk's Office of Fulton County, Georgia, and that said records reveal only the following cases since the year 1952 in which injunctions have been granted or denied against labor unions, and in none of said cases did the case come on for trial on final hearing. Said cases are as follows:

TEMPORARY INJUNCTION GRANTED RESTRAINING ALL PICKETING AND/OR ENTIRE STRIKE

(Said cases were filed during the two year periods of time set forth under the word "DATE".)

Style	Case No.	Book No.	Page No.	Date
The Jordan Co., vs. Local Union No. 225, United Brotherhood of Carpenters and Joiners of America.	A-90561	S-8	526	1960-61
Morgan Plumbing & Heating Co., vs. Local 72, Plumbers Union.	A-77975	K-8	588	1960-61
The Dickey Construction Co., vs. Local 72, Plumbers Union.	A-79492	L-8	546	1960-61
H. W. Ivey Construction Co., Inc., vs. Local 72, Plumbers Union.	A-90468	S-8	434	1960-61
R. L. Eskew Contracting Co., vs. Local 613, Electrical Workers Union.	A-73411	H-8	706	1958-59
R. L. Eskew Contracting Co., vs. Local 72, Plumbers Union.	A-73635	I-8	18	1958-59
Perry Printing Process Co., vs. Local 72, Plumbers Union.	A-74953	I-8	678	1958-59
Maple Drive Investment Corp., v. Local 82, Sheet Metal Workers Union.	A-68334	E-8	567	1958-59
Huckabee Transport Corp., vs. Local 728, Teamsters Union.	A-73591	H-8	796	1958-59
F. N. Thompson, Inc., vs. District Council No. 38 and Local No. 193, Printers Union.	A-68018	E-8	409	1958-59
H. W. Ivey Construction Co., Inc., vs. Local 438, Laborers Union.	A-68595	E-8	698	1958-59
The Bonny Corporation vs. Local 438, Laborers Union.	A-76808	K-8	4	1958-59
H. W. Ivey Construction Co., vs. Local 438, Laborers Union.	A-76809	K-8	13	1958-59
Johnson Freight Lines, Inc., vs. Local 728, Teamsters.	A-68453	E-8	698	1958-59

Style	Case No.	Book No.	Page No.	Date
Dixie Ohio Express, Inc., vs. Local 728, Teamsters Union.	A-68454	E-8	698	1958-59
Ryder Truck Lines, Inc., vs. Local 728, Teamsters Union.	A-77184	K-8	192	1958-59
Maple Drive Investment Corp., vs. Local 926, Operating Engineers.	A-68505	E-8	653	1958-59
Maple Drive Investment Corp., vs. Local 438, Laborers Union.	A-68596	E-8	698	1958-59
Georgia Utility Construction Co., vs. Local 72, Plumbers; Local 438, Laborers Union; and Local 926, Operating Engineers Union.	A-63539	B-8	570	1956-57
Campbell Coal Co., vs. Local 859, Teamsters Union; Local 926, Operating Engineers; Local 438, Laborers Union.	A-54285	V-7	743	1956-57
Loo Mac Freight Lines, Inc., vs. Local 728, Teamsters Union.	A-56267	X-7	134	1956-57
The Thomas Pipe Line Co., Inc., vs. Local 225, Carpenters Union.	A-57717	Y-7	58	1956-57
H. W. Ivey Construction Co., vs. Bricklayers and Masons Union No. 8 of Georgia.	A-51320	V-7	60	1954-55
Atlanta Steel Erectors, Inc., vs. Local 859, Teamsters Union.	A-47283	R-7	442	1954-55
George's Pick-Up and Delivery Service vs. Local 728, Teamsters Union.	A-49028	S-7	51	1954-55
Lance Roofing Co., Inc., vs. Local 136, United Slate Tile & Composition Roofers Union.	A-49087	S-7	44	1954-55
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/s/ Thomas L. Carter, Jr.
Thomas L. Carter, Jr.

Sworn to and subscribed before me, this 21st day of March, 1962.

/s/ Lillian C. Ray
Notary Public, Georgia, State at Large.
My Commission expires Jan. 16, 1963.

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Supreme Court of the United States

No. 87

LOCAL No. 438 CONSTRUCTION & GENERAL LABORERS' UNION, AFL-CIO,
Petitioner,

versus

S. J. CURRY, C. D. McKNIGHT, JR., E. G. HIGHTOWER AND J. E. TAPPAN, d/b/a S. J. CURRY & COMPANY, a Partnership,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Georgia.

BRIEF OF RESPONDENT.

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SUPREME COURT OF THE UNITED STATES.

No. 87.

LOCAL No. 438 CONSTRUCTION & GENERAL LABORERS' UNION, AFL-CIO,

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S. J. CURRY, C. D. McKNIGHT, JR., E. G. HIGHTOWER J. E. TAPPAN, d/b/a S. J. CURRY & COMPANY, a Partnership,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Georgia.

BRIEF OF RESPONDENT.

QUESTIONS PRESENTED.

By virtue of the order granting certiorari issued from this Court on the 21st day of May, 1962, the questions to be considered by this Court are limited to the following and shall be considered by the Respondent in the order named:

(1) Was the decision of the Supreme Court of the State of Georgia from which certiorari was granted by the Supreme Court of the United States a final judgment from which the Supreme Court of the United States could properly grant certiorari?

(2) In granting said injunction, said court deprived Petitioner in Certiorari of rights protected by the National Labor Relations Act, Title 29, Section 157 of the United States Code Annotated?

(3) In granting said injunction said court assumes jurisdiction of a cause, the subject matter of which had been pre-empted by enactment of the National Labor Relations Act, Title 29, Section 157-158 (b) of the United States Code Annotated?

(4) Did the Supreme Court of Georgia err in holding that it was illegal for the Petitioner to carry a placard in front of the construction job containing the statement: "S. J. Curry & Company, Inc., violating contract with City of Atlanta by not paying wages conforming with those of similar types of work in the Atlanta area. Construction & General Laborers' Union 438, AFL-CIO."? The Court so held, notwithstanding the fact that the Court found that the legend carried upon said sign was true and that S. J. Curry & Company was not paying the prevailing wage in the area even though it had executed a contract with the City of Atlanta for said construction which contract contained the provision: "Wages will conform with those being paid on similar types of work in the Atlanta area."

STATUTES INVOLVED.

In addition to the statutes set forth in Petitioner's brief as being pertinent to the issues raised, the following section of the United States Code Annotated, Title 29, Section 164 (b), 61 Stat. 136, Section 14(b), is also pertinent to an understanding of the questions raised.

> "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

STATEMENT OF THE CASE.

The statement of the case contained in Petitioner's brief is essentially correct although Petitioner had taken several liberties in drawing conclusions from portions of the record which it is felt are entirely unwarranted. Contrary to the statement of Petitioner that the trial judge found at the original interlocutory hearing that the Petitioner was engaging in picketing for purposes of publicizing the fact that the Defendant in Certiorari was not paying the prevailing wage in the Atlanta area in violation of its contract with the City of Atlanta, the Honorable Ralph H. Pharr, Judge of the Superior Court of Fulton County, made no such finding; but simply found from the pleadings, affidavits, oral testimony and argument of counsel that the re-

quested temporary interlocutory injunction should be denied. (Tr. 41.)

It is also contended by the Petitioner in its statement of the case that the decision of the Supreme Court of Georgia, which is reported in 217 Ga. 512 and 123 S. E. 2d 653, held that the language upon the picket signs was true and that the wages being paid were not those conformed with those wages being paid in the Atlanta area and that said failure to pay said wages constituted a breach of contract. It is important at the outset, in understanding the statement of the case, that this Court recognize that while the Supreme Court of Georgia held that the trial judge *was authorized* (Emphasis supplied) to find from the evidence that the Defendant in Certiorari was not paying wages conforming with those paid for similar type work in the Atlanta area, there was no holding by the Court that the contract in question between the Respondent and the City of Atlanta was in fact breached. Nor was there a holding by the Supreme Court of Georgia, as contended by Petitioner, that the information contained on the picket sign was true, but rather the Supreme Court of Georgia found that the Respondent was not paying a wage scale of certain specified construction contractors in the Atlanta area of similar type work. (Tr. 43.)

It is felt that these preliminary distinctions are important in any statement of the case for the Supreme Court of Georgia's decision did not turn on any question of breach of contract between the Respondent and the City of Atlanta nor did the Supreme Court of

Georgia concern itself with the veracity of the statements on the picket signs carried by Petitioner, but rather the Court's inquiry was directed towards the resulting and underlying purpose of Petitioner's conduct in its picketing of the sewage disposal facilities under construction by the Respondent.

SUMMARY OF ARGUMENT.

At the outset or threshhold of any consideration of the merits of this case, as limited by the specifications in the grant of certiorari, this Court of necessity must first decide whether or not the ruling of the Supreme Court of Georgia on an interlocutory injunction is subject to review. It is the contention of the Respondent that the certiorari was improvidently granted under the past decisions of this Court and that the case does not now stand ready for review by this Court as it has not reached that degree of finality required by this Court. The case presently stands on the trial docket of the Superior Court of Fulton County, Georgia subject to be called for final hearing consistent with the decree of the Supreme Court of Georgia, and it is submitted that because of the nature of an interlocutory order in the practice and procedure of Georgia courts the case still remains in the interim stage with many decisions on the final merits to be determined at the final hearing in the trial court.

The conduct of the Petitioner at the construction site of the Respondent in Atlanta, Georgia has admittedly resulted in job stoppage and loss of work and under

the uncontradicted evidence the picket line of the Petitioner was not established until after demand was made to use union labor exclusively on the job. Under these facts the conduct of the Petitioner was clearly violative of the right to work statutes of the State of Georgia and contrary to the public policy of that state and as such the courts of Georgia had jurisdiction of the matter and the conduct was not pre-empted or protected by any provisions of the National Labor Relations Act.

Under the uncontradicted evidence as reflected in the transcript, the conduct of the Petitioner was calculated to put the Respondent in a position of requiring union membership as a condition of employment or in the alternative to be unable to comply with its contract with the City of Atlanta. Under these facts, the Supreme Court of Georgia did not err in finding that the conduct was a violation of the statutes of that state notwithstanding any language on the picket sign carried by Petitioner, for irrespective of the statements contained on the placard or picket sign carried by the Petitioner, the Supreme Court of Georgia has found, and justifiably so, that Petitioner's conduct was a violation of the statutes of that state.

ARGUMENT.

The Writ of Certiorari was Improvidently Granted in the Instant Case.

In the words of Mr. Justice Minton, we are at the very threshold presented with a serious question of

jurisdiction. In granting certiorari in the instant case this Court requested counsel to brief and argue the question of the Court's jurisdiction to review the judgment of the Supreme Court of Georgia under 28 U. S. C. §1257. As stated in the Respondent's brief resisting the Writ of Certiorari, the Petitioner seeks to have this Court review a judgment of the Supreme Court of Georgia which reversed an interlocutory judgment or order of Fulton County Superior Court in the State of Georgia. The judgment of the Supreme Court of Georgia in reversing the trial court has in effect returned the case to the lower court for such further disposition as may be proper under the pleadings. The case now stands on the trial docket of Fulton Superior Court for final disposition and final trial. It is respectfully submitted that on these facts alone there is no final judgment in the case such as would give this Court jurisdiction to entertain the present review as contemplated under 28 U. S. C. §1257.

The issue is, basically, whether or not the judgment of the Georgia Supreme Court is such a final judgment or decree within the meaning of Section 1257 as to give this Court jurisdiction. This Court has previously ruled clearly and concisely that a case, such as the instant case, is not right for review by virtue of a Writ of Certiorari when the facts show that the state court's decree simply has the effect of returning the matter to the lower trial court for such further disposition as may be proper under the pleadings of that state. The issue thus presented is not a novel one to

the Court and as a matter of fact has been dealt with foursquarely in the case of *Montgomery Building and Construction Trade Council, et al., Petitioners vs. Ledbetter Erection Company, Inc.*, which is reported in 344 U. S. 178, 97 L. Ed. 204, 73 S. Ct. 196.

It would indeed be difficult to find a decision more squarely in point with the initial problem raised in the instant case than this decision; and Judge Minton, in speaking for a seven member majority of the Court, so clearly and strongly states the Court's position on such matters as to warrant a recitation of the main body of that decision.

Judge Minton pointed out on Page 180 of that decision:

> "From the earliest days, this Court has refused to accept jurisdiction of interlocutory decrees, such as is involved in this case. In Gibbons v. Ogden (US) 6 Wheat 448, 5 L ed 302, the first case presenting this issue to this Court, an injunction had been granted by a Chancery Court of the State of New York. The defendant answered and moved to dissolve the injunction. The court denied the motion to dissolve, and the defendant appealed to the Court for the Trial of Impeachments and Correction of Errors which affirmed. The appeal to this Court was dismissed because there was no final decree in the court of last resort for this Court to review.
>
> The provision of §1257 that only 'Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be re-

viewed by the Supreme Court . . . .' has been carried in almost identical language since the Judiciary Act of 1789, 1 Stat. 85 §25.

'This requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system.' Radio Station WOW v. Johnson, 326 US 120, 124, 89 L ed 2092, 2097, 65 S. Ct. 1475.

The distinction between a preliminary or temporary injunction and a final or permanent injunction was elementary in the law of equity. The classical concept was at once recognized and applied in Gibbons v. Ogden (US) supra. There is no room here for interpretation. The rule remains unchanged.

True, as long as a temporary injunction is in force it may be as effective as a permanent injunction, and for that reason appeals from interlocutory judgments have been authorized by state legislatures and Congress. But such authorization does not give interlocutory judgments the aspect of finality here, even though we may have inadvertently granted certiorari. Baldwin Co. v. R. S. Howard Co., 256 US 35, 40, 65 L ed 816, 818, 41 S Ct 405.

It is argued that if this is not held to be a final decree or judgment and decided now, it may never be decided, because to await the outcome of the final hearing is to moot the question and to frustrate the picketing. However appealing such argument may be, it does not warrant us in enlarging our jurisdiction. Only Congress may do that. Furthermore, the interlocutory decree could have been readily converted into a final decree,

and the appeal could have proceeded without question as to jurisdiction just as effectively and expeditiously as the appeal from the interlocutory injunction was pursued in this case.

Since there was no final judgment of the Supreme Court of Alabama for review, the writ of certiorari must be dismissed as improvidently granted."

The reasoning of Justice Minton in the *Montgomery* case, *supra*, remains judicially sound and the requirement of finality announced in this decision derives added force and importance when, as in this instant case, the jurisdiction of the United States Supreme Court is invoked to upset a decision of the Supreme Court of Georgia.

Justice Frankfurter, in delivering the opinion of the Court in the case of *Radio Station WOW vs. Johnson*, 326 U. S. 120, 89 L. Ed. 2092, 65 S. Ct. 1475, in speaking on the question of finality of state courts' judgments, said at page 124 of that decision:

"This requirement has the support of considerations generally applicable to good judicial administration. It avoids the mischief of economic waste and of delayed justice. Only in a very few situations, where intermediate rulings may carry serious public consequences, has there been a departure from this requirement of finality for federal appellate jurisdiction. This prerequisite to review derives added force on the jurisdiction of this Court is invoked to upset the decision of the state court. Here we are in the realm of po-

tential conflict between the courts of two different governments. And so, ever since 1789, Congress has granted this Court the power to intervene in state litigation only after 'the highest court of the State in which a decision in a suit could be had' has rendered a 'final judgment or decree.' Section 237 of the Judicial Code, 28 U. S. C. A. §344(a), 8 F. C. A. Title 28, §344(a). This requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system."

Notwithstanding any contention by the Petitioner to the contrary, the fact remains that the interlocutory order in the instant case is not a final order within the meaning of 28 U. S. C. §1257, and this Court is in effect being asked to review exactly the same type of order or judgment that it refused to review in not only the *Montgomery* case above, but also *American Federation of Labor vs. Swing*, 309 U. S. 659, 84 L. Ed. 1007, 60 S. Ct. 514; *Gibbons vs. Ogden*, (U. S.) 6 Wheat 448, 5 L. Ed. 302, and *Moses vs. Mobile*, (U. S.) 15 Wall 387, 21 L. Ed. 176.

It should perhaps also be mentioned in passing that there is no contention here that the Petitioner will suffer irreparable harm if this Court does not entertain this review at this time, (see *Clark vs. Willard*, 294 U.S. 211, 79 L.Ed. 865, 55 S.Ct. 365) nor has there been any contention that there is such a grave public issue involved as would warrant the intervention of this Court at this time. The facts in the instant case

lend themselves well to an application of the *Montgomery* decision. For notwithstanding the contentions of Petitioner in regard to the status of the interlocutory injunctions in the trial courts in Georgia, and especially in Fulton Superior Court, the hard fact remains that the present case, as it now stands on the trial docket, remains undisposed of and stands ready for trial when called by that Court for final hearing. Petitioner itself has had a Plea in Abatement pending in the trial court since the original pleadings were filed and has never called this Plea for hearing and disposition, although the Plea in Abatement attacks the jurisdiction of the Georgia court and raises the very questions that Petitioner would seek to have this Court answer. It is also important that this Court recognize that notwithstanding the judgment of the Supreme Court in reversing the trial court, and the fact that by remittitur the judgment of the Supreme Court of Georgia has been made the judgment of the lower court, no order or affirmative relief has ever been issued by the lower court actually restraining the conduct of the Petitioner.

This Court should also recognize that the question of whether or not there had been a sufficient involvement of interstate commerce so as to invoke federal jurisdiction or control has remained undecided in this case and has never been adjudicated by the courts of Georgia. That is, notwithstanding the stipulation between the parties that the Respondent purchased in excess of $50,000.00 worth of goods out of state to be delivered to the job in Atlanta, Georgia, there is no allegation in the original complaint that either the

Petitioner or Respondent were engaged in interstate commerce nor are there any additional facts in the record upon which this matter could judicially be decided. Rather, Petitioner has simply assumed that the stipulation concerning purchase of goods and commodities from out of state is sufficient to bring this entire matter within federal jurisdiction due to the involvement of interstate commerce. Actually, this question was irrelevant to the issues brought up at the original interlocutory hearing by the Respondent and the question of whether or not the state court has jurisdiction will properly be decided either upon the Petitioner's Plea in Abatement or in the final hearing of the matter.

At any rate, as the matter now stands, the instant case has not reached that degree of finality as would make it subject to review by this Court by the previous standards laid down not just by this Court but, most importantly, by the provisions of 28 U. S. C. §1257. As Justice Minton stated in the *Montgomery* decision, the enlargement of the jurisdiction of this Court in regard to finality of interlocutory decrees is a matter which is properly left to the Congress.

In recognition of the prior rulings of this Court and in an attempt to evade these decisions, the Petitioner has incorporated into its brief an affidavit which purports to demonstrate that over the past ten years not a single application for interlocutory injunction was ever processed to a final hearing in Fulton Su-

perior Court. However, even assuming that this Court could properly consider such *aliunde* evidence, and that the facts contained in the affidavits are true, the fact remains that the instant case still involves an interim matter or interlocutory decree and many facets of the principal case are yet to be decided in the trial court. Further, in the instant case, unlike the vast majority of cases cited by Petitioner in support of its position, the interlocutory decree was not granted by the trial court, and the Petitioner was left to continue the picketing at its leisure without obstruction. It was only after the Respondent prosecuted its appeal to the Supreme Court of Georgia that the Petitioner voluntarily removed the pickets concerned and the Respondent was able to return to a normal work situation. Once again, it must be borne in mind that notwithstanding the decree of the Supreme Court of Georgia in reversing the trial judge's refusal to grant the interlocutory order, no affirmative relief in the form of a restraining order was ever issued from the trial court.

As Justice Frankfurter said in *Radio Station WOW, Inc. vs. Johnson, supra*, the requirement of finality as set out in the provisions of Section 1257 is one that is supported by good judicial administration. For without this rule this Court would be called upon to decide questions of merit and substance in piecemeal fashion which later might become moot because of additional proceedings in the state court. Thus, it is respectfully submitted that this Court should not now intervene piecemeal in litigation which is not otherwise disposed

of in the State of Georgia. The jurisdiction of this Court has been invoked in an attempt to upset the decision of a state court; and there is indeed the possibility of a potential conflict between the courts of these two different governments. This is the very situation that Justice Frankfurter spoke out against in *Radio Station WOW vs. Johnson, supra*, and which was recognized by Justice Minton in the *Montgomery* case.

This Court was concerned with the question of finality of a state court decree in the case of *Republic Natural Gas Company vs. Oklahoma*, 334 U. S. 62, 92 L. Ed. 1212, 68 S. Ct. 972. Justice Frankfurter, speaking for the majority again, said on Page 67 of that decision in regard to finality:

> "Ever since 1789, Congress has granted this Court the power of review in State litigation only after 'the highest court of a State in which a decision in a suit could be had' has rendered a 'final judgment or decree.' §237 of the Judicial Code, 28 USCA §344, 8 FCA title 28 §344, rephrasing §25 of the Act of Sept. 24, 1789, 1 Stat. 73, 85, c. 20. Designed to avoid the evils of piecemeal review, this reflects a marked characteristic of the federal judicial system, unlike that of some of the States. This prerequisite for the exercise of the appellate powers of this Court is especially pertinent when a constitutional barrier is asserted against a State court's decision on matters peculiarly of local concern. Close observance of this limitation upon the Court is not regard for a strangling technicality. History bears ample

testimony that it is an important factor in securing harmonious State-federal relations."

Judicial precedent has long been that effective catalytic agent which down through the years has given any judiciary or judicial system a sound and stable foundation. We submit that the *Montgomery* case is sound and reflects a clear construction of Section 1257; and for this Court to grant certiorari in the instant case it must of necessity reverse the *Montgomery* case and the decisions upon which the *Montgomery* case was founded. An overruling of the *Montgomery* case will put this Court in a position of accepting piecemeal litigation and will effectively destroy the good judicial administration of which Justice Frankfurter spoke, and perhaps more importantly, a change of this Court's attitude towards review of interlocutory orders, as expressed in the *Montgomery* case, will destroy the congressional intent to restrict this Court's reviewing power as reflected in the statute since the Judiciary Act of 1789

The Supreme Court of Georgia did not Deprive the Petitioner in Certiorari of Rights Protected by the National Labor Relations Act, Title 29, Section 157-158(b) in Enforcing the Right to Work Laws of the State of Georgia; Nor Has it Assumed Jurisdiction Over a Matter Which Has Been Pre-Empted by These Sections.

The question of whether or not the Supreme Court of Georgia by its decision has in any way deprived Petitioner of rights guaranteed and protected under

the National Labor Relations Act as amended or has assumed jurisdiction of a matter which has been preempted by the federal government, requires some construction of the National Labor Relations Act and most particularly of those provisions which the Petitioner contends removes this case entirely from consideration by the state court. Title 29, §157 of the United States Code Annotated, reads as follows:

> "Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining, or other mutual aid or protection, and shall also have the right to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 158 (a) (3) of this title."

Section 158(a)(3) mentioned in the quoted section authorizes the execution of a union shop agreement pursuant to certain qualifications listed therein. Petitioner also deems Section 158(b) of Title 29, United States Code Annotated, pertinent to its appeal here insofar as this section relates to prohibited conduct on the part of a labor organization which would in any way restrict or coerce employees in the exercise of their right guaranteed in Section 157 or to cause an employer to discriminate against an employee because of his failure to either belong to a labor organization or to

tender periodic dues or initiation fees required as a condition of membership. All of these sections, however, must be considered in *peri materia* with Section 164(b) of the same Act which reads:

> "Nothing in this Act shall be construed as authorizing the execution of application of agreements requiring membership in a labor organization as a condition of employment in any state or territory in which such execution or application is prohibited by state or territorial law."

It therefore seems that Congress has unequivocably expressed its intention to leave to state sovereignty, in the field of interstate labor relations, the power to either permit or prohibit contracts containing union security provisions requiring membership in a labor organization as a condition of employment. The congressional intent behind the enacting of Section 164(b) is clearly manifested in Conference Committee Report, House Report No. 510 dated June 3, 1947 (U. S. Code Congressional Service, 80th Congress, First Session 1947, Page 1166) where the following report appears:

> "Under the House bill there was included a new section 13 of the National Labor Relations Act to assure that nothing in the act was to be construed as authorizing any closed shop, union shop, maintenance of membership, or other form of compulsory unionism agreement in any State where the execution of such agreement would be contrary to State law. Many States have enacted laws or adopted constitutional provisions to make all forms of compulsory unionism in those States illegal. It

> was never the intention of the National Labor Relations Act, as is disclosed by the legislative history of that act, to preempt the field in this regard so as to deprive the States of their powers to prevent compulsory unionism. Neither the so-called 'closed shop' proviso in section 8 (a) (3) of the conference agreement could be said to authorize arrangements of this sort in States where such arrangements were contrary to the State policy. To make certain that there should be no question about this, section 13 was included in the House bill. The conference agreement, in section 14 (b), contains a provision having the same effect."

The underlying principle as expressed in the congressional report, was reiterated by Justice Frankfurter, who speaking for this Court in *Algoma Plywood and Veneer Company vs. Wmb*, 336 U. S. 301, 93 L. Ed 691, 69 S. Ct. 584, said

> "Other provisions of the Taft-Hartley Act make it even clearer than the National Labor Relations Act that the States are left free to pursue their own more restrictive policies in the matter of union-security agreements. Because 8(3) of the new Act forbids the closed shop and strictly regulates the conditions under which a union-shop agreement may be entered, 14(b) was included to forestall the inference that federal policy was to be exclusive."

This Court, on numerous occasions, has recognized that a state possesses jurisdiction to enjoin picketing for an unlawful purpose, although peaceful in nature when such picketing is in contravention of the public

policy as declared in a particular state right to work law. *Local Union No. 10, United Association of Journeymen, Plumbers and Steamfitters of the United States and Canada of the AFL, et al. vs. O. G. Graham*, 345 U. S. 192, 97 L. Ed. 946, 73 S. Ct. 585; *Building Service Employees International Union vs. Gazzam*, 339 U. S. 532, 94 L. Ed. 1045, 70 S. Ct. 784; *International Brotherhood of Teamsters, C. & W. H. Union vs. Hanke*, 339 U. S. 470, 94 L. Ed. 995, 70 S. Ct. 773; *International Brotherhood of Teamsters Local 695, AFL vs. Vogt, Inc.*, 354 U. S. 284, 1 L. Ed. 2d 1347, 77 S. Ct. 1166.

In the *Graham* case, *supra*, labor unions picketed a construction project because some of the subcontractors employed non-union help, similar to the instant case. Although the picketing was essentially peaceful in nature, the Virginia courts enjoined it on the ground that it was carried on for the purpose of coercing the general contractor into forcing his subcontractors to employ only union labor on the job; and because of this finding the Virginia Supreme Court of Appeals found that the conduct of the labor unions was carried on for a purpose in conflict with the right to work statute of that state. Mr. Justice Burton, speaking for the majority of the Court, stated that the basic question involved was whether the Commonwealth of Virginia, consistently with the constitution of the United States, might enjoin peaceful picketing when it is carried on for a purpose in conflict with the Virginia right to work statute. It is interesting to note that this Court in finding that the Virginia court had the

authority to enjoin such peaceful picketing noted that from the record it was obvious that the Petitioner had engaged in something more than the mere publication of the fact that the particular job was not 100 per cent union. Rather this Court, speaking again through Justice Burton, said on page 200 of this decision

> "that picketing was done at such a place and in such a manner, that coupled with established union policies and traditions, it caused the union men to stop work and thus slowed the project to a general standstill. . . . . ."

And further at Page 201:

> "Based upon the finding of the trial court, we have a case in which picketing was undertaken and carried on with at least one of its substantial purposes in conflict with the declared policy of Virginia. The intermediate result of the picketing demonstrated its potential effectiveness, unless enjoined, as a practical means of putting pressure on the general contractor to eliminate from further participation all non-union men or all subcontractors employing non-union men on this project."

The foregoing statements of Justice Burton are closely related to the finding of fact that the Georgia Supreme Court made in regard to the conduct of the picketing in the instant case.

The *Vogt* case, *supra*, while dealing directly with the question of the state's power to enjoin picketing, notwithstanding rights granted under the Fourteenth Amendment, also was a recognition by this Court of the

right of the Wisconsin Supreme Court to enjoin picketing which was otherwise peaceful in nature when it contravened a state policy prohibiting a union from picketing to coerce an employer to put pressure upon his employees to join a union. Justice Frankfurter in speaking for the majority and in tracing the history of the conflict created by the Thornhill doctrine on the one hand, and the recognition on the other of states to enforce their public policy, stated on Page 291 of the decision:

> "The implied reassessments of the broad language of the Thornhill case were finally generalized in a series of cases sustaining injunctions against peaceful picketing, even when arising in the course of a labor controversy, when such picketing was counter to *valid state policy in a domain open to state regulations.*" (Emphasis supplied.)

The learned Justice further stated on Page 294 of that decision in reference to the *Stacey* case (350 U. S. 870, 100 L. Ed. 770, 76 S. Ct. 117):

> "As in Stacey the highest state court *drew the inference from the facts* that the picketing was to coerce the employer to put pressure on his employees to join the union in violation of the declared policy of the State." (Emphasis supplied.)

The provisions of Section 164(b) of the Act coupled with the recognition by this Court of the state's right to enforce its right to work statutes against otherwise peaceful picketing seemed to lead to the inescapable conclusion that the Supreme Court of Georgia did not

deny to Petitioner in Certiorari any rights protected or guaranteed under the National Labor Relations Act.

It is the position of the Petitioner in Certiorari that irrespective of whether the conduct of its pickets was an expression of a right under Section 7 of the Act or was unlawful conduct under Section 8 of the Act, the fact remains that in either event such conduct has been pre-empted and the state court lacked jurisdiction in the matter. There can be no doubt that if the conduct of the Petitioner was either protected or prohibited under the Act, then in that event the Supreme Court of Georgia could have no jurisdiction. *Hotel Employees Union Local 255 vs. Sax Enterprises*, 358 U. S. 270, 3 L. Ed. 2d 289, 79 S. Ct. 273. The Petitioner in Certiorari in support of its contention that the concerted activity of its members at the Respondent's construction site was either a protected activity under Section 7 or an unlawful activity under Section 8 and hence jurisdictionally protected by the Act and pre-empted so as to be out of control of the state courts, cites the cases of *Weber vs. Anheuser-Busch, Inc.*, 348 U. S. 468, 99 L. Ed. 546, 75 S. Ct. 480; *Building Trades Council vs. Garmon*, 359 U. S. 236, 3 L. Ed. 2d 775, 79 S. Ct. 773; *Youngdahl vs. Rainfair, Inc.*, 355 U. S. 131, 2 L. Ed. 151, 78 S. Ct. 206; *Garner vs. Teamsters, C & H Local Union*, 346 U. S. 485, 98 L. Ed. 228, 74 S. Ct. 161; and *Hotel Employees Union Local 255 vs. Sax Enterprises*, 358 U. S. 270, 3 L. Ed. 2d 289, 79 S. Ct. 273.

The distinction between the cases cited by the Petitioner and the *Graham* and *Vogt* cases and the instant

case is that in the latter instances the Supreme Court of Virginia, Wisconsin and Georgia have found from the record that the conduct of the union was unlawful in that it was calculated to cause a situation which was repugnant to the right to work statutes of the respective states. It is respectfully submitted that there is nothing in the record of the instant case which would in any way justify a finding that the conduct of the Petitioner was either protected or prohibited under the Act. Although the Petitioner contends and stated in its brief that the purpose of its picketing was to publicize certain facts surrounding the Respondent's job, the Supreme Court of Georgia did not accept this view and rather found from the evidence that Petitioner's conduct was calculated to force the Respondent to either hire union labor on its Atlanta job or in the alternative to be unable to comply with the terms of its contract with the City of Atlanta. If the Supreme Court of Georgia was correct in drawing an inference from the facts, as shown in the record, that the picketing in question was to coerce the Respondent in violation of the declared public policy of the State of Georgia, then it is humbly submitted that the doctrine expressed in the *Vogt* and *Graham* cases must prevail. Thus, it becomes of paramount importance to examine the finding of facts made by the Supreme Court of Georgia in order to determine whether or not its conclusion was justified.

Before dealing with the evidence considered by the Supreme Court of Georgia the Respondent would like

to point out to the Court that all the cases cited by the Petitioner, in support of its contention of preemption, may be distinguished because the concerted activity in each case was of its very nature within either Section 7 or 8 of the Act.

In this regard an examination of *Weber vs. Anheuser-Busch, Inc.*, 348 U.S. 468, shows on its very face that the picketing in question was to compel the employer to insert a certain clause into a contemplated collective bargaining contract, which conduct was obviously covered by the Act. In the case of *Building Trades Council vs. Garmon*, 359 U. S. 236, the facts showed that the union picketed the employer in an attempt to obtain a written agreement containing a union security agreement and, most importantly, the facts show that the effort was directed towards employees of the company picketed; an activity which is likewise obviously protected under the Act. In the case of *Youngdahl vs. Rainfair, Inc.*, 355 U. S. 131, it actually appears there was a labor controversy in progress between the employees and the employer who was picketed; and this is also a situation which is very closely covered by the Act. In *Garner vs. Teamsters*, 346 U. S. 485, while the picketing was for the purpose of inducing employees to join the union the record clearly discloses that an interstate trucking company was involved and, perhaps most importantly, there was a finding by the Supreme Court of Pennsylvania that the conduct of the union fell within the jurisdiction of the National Labor Relations Board. In *Hotel Employees Union Local 255 vs. Sax Enterprises*, 358 U. S. 270, it was stipulated in the

record that interstate commerce was involved and accordingly the issues raised were covered by the Act.

It is submitted that there is nothing contained in the instant case which would substantiate Petitioner's contention that its conduct was protected or prohibited by the Act and the Supreme Court of Georgia has made no finding nor does the record reveal any evidence, which would justify a conclusion other than that reached by that Court. It becomes manifestly clear that whether or not the *Graham* and *Vogt* theory will be applied in the instant case depends entirely upon whether or not the conduct of the Petitioner, or at least its primary purpose, was to attempt to force Respondent into a situation which would be repugnant to the right to work statutes of the State of Georgia. Accordingly, it is essential that we turn to an examination of the record in order to determine whether the Supreme Court of Georgia was authorized in drawing the inference that the conduct of Petitioner was unlawful and contrary to the laws of that state.

The Supreme Court of Georgia Did Not Err in Holding that the Conduct of the Petitioner in Certiorari in Placing a Picket in Front of the Construction Job of the Respondent was Unlawful Conduct Under the Statutes of the State of Georgia.

The Supreme Court of Georgia in its decision, contrary to the contentions of Petitioner, did not find that the language upon the picket sign was true or that

the wages being paid by Respondent were not conforming with wages of a similar type of work in the Atlanta area or that the Respondent had breached its contract with the City of Atlanta. Rather, what the Supreme Court of Georgia did say was that the Petitioner had introduced evidence at the interlocutory hearing intending to show that the Respondent was not paying its employees the wage scale of *specified construction contractors* in the Atlanta area (Emphasis supplied) (Tr. 43); and that the trial judge *was authorized to find from the evidence* that the Respondent was not paying wages conforming with those paid for similar type work in the Atlanta area. (Emphasis supplied) (Tr. 43). No where in the decision of the Supreme Court of Georgia is there a finding that in fact there had been a violation of the contract with the City of Atlanta by the Respondent.

These distinctions are made to demonstrate that contrary to the contentions of Petitioner, we are not dealing with the right to peacefully exercise the right of communication in regard to economic conditions. It is submitted that while the Petitioner would have this Court believe its conduct was calculated only to disseminate information regarding an alleged breach of contract between the Respondent and the City of Atlanta, the record of this case clearly discloses otherwise. The Petitioner contends that its activity was protected under Section 8 of the Act because there was concerted activity for mutual aid or protection within the meaning of this section; and for this reason the Petitioner's contentions in regard to the breach of

contract by Respondent and the truthfulness of the statements on its picket sign become important. However, the Supreme Court of Georgia found notwithstanding the statements contained on the picket sign, that the undisputed evidence demonstrated clearly that the establishment of the picket line by the Petitioner in Certiorari was a signal to all members of labor unions to refuse to work on that particular job, or to furnish supplies for it and that this fact was well known to the Petitioner. The Court also found that the Respondent had no labor dispute with its employees and that the Petitioner was not representing employees of the Respondent. The Court further found that the Petitioner had chosen to use a method of importing information to the public which it knew would have the effect of paralyzing the Respondent's operations, preventing them from completing their contract within the time limit provided by its terms and forcing them to discharge a number of their employees. The Court then having found these facts from the evidence as presented in the Bill of Exceptions concluded that the facts of this case were similar to those of the case of *Powers vs. Courson*, 213 Ga. 20 (1), 96 S. E. 2d. 577, and that the evidence demanded a finding that the picket was placed on the job for the purpose of forcing the Respondent to employ only union labor or to be unable to comply with the terms of its contract because of the refusal of other unions employed in the work to cross the picket line and thereby slow the project to a virtual standstill; and as it held in the *Powers* case such picketing was for an unlawful purpose under the

statutes of the State of Georgia and was clearly a violation of the provisions of the Annotated Code of Georgia, §54-804 and §66-906.

As a general proposition, this Court has of course always followed the decisions of the highest court of a particular state as they relate to the construction of laws of that state unless there is some conflict with or impairment of a principle of the federal constitution or a federal statute. *Standard Oil Company vs. New Jersey*, 341 U. S. 428, 95 L. Ed. 1078, 71 S. Ct. 822, and numerous decisions cited therein. Of course, it is equally well established that this Court is justified in searching the record of a given case to determine whether the crucial findings by a state court had a reasonable basis in the evidence. *Local Union No. 10-AFL vs. Graham, supra*, and *Milkwagon Drivers Union vs. Meadowmoor Dairies*, 312 U. S. 287, 85 L. Ed. 836, 61 S. Ct. 552.

Justice Frankfurter, speaking for the Court, in the *Meadowmoor Dairies* case, *supra*, pointed out on Page 294 that the decision in regard to the Court's evaluation of testimony taken initially before a master and then authenticated by the Supreme Court of Illinois:

> "It is not for us to make an independent evaluation of the testimony before the master. We have not only his findings but his findings authenticated by the State of Illinois speaking to her Supreme Court. We can reject such a determination only if we can say that it is so without warrant as to be a possible invasion of the constitutional guar-

anty here invoked. *The place to resolve conflicts in the testimony and its interpretation was in the Illinois court and not here.* (Emphasis supplied.) To substitute our judgment for that of the state court is to transcend the limits of our authority. . . . ."

Thus, as Justice Burton announced in the *Graham* case, this Court must limit its review of the merits of this case to a searching of the record to determine whether the findings by the Supreme Court of Georgia had a reasonable basis on the evidence presented under the Bill of Exceptions by the Respondent. It is respectfully submitted that the decision of the Supreme Court was not only sound and a correct interpretation of the statutes of that state but was well supported by the findings of fact enumerated above and contained in the record before the Supreme Court of Georgia.

In searching the record of this case to determine whether the Supreme Court of Georgia's findings had a reasonable basis, the Court's attention is directed first to uncontradicted portions of the evidence which substantiates the conclusion made by the Supreme Court of Georgia that the conduct of the Petitioner was for a purpose unlawful and in violation of the right to work statutes of that state. The affidavits of S. J. Curry and B. L. Humphries, Jr. (Tr. Exhibits A and B, pages 7-15) taken together establish as an uncontradicted fact that the Respondent had no labor dispute with any of its employees at the time Petitioner

placed its pickets on the construction site, nor did the Respondent have any sort of labor dispute or legal relationship with the Petitioner. These affidavits also establish as an uncontradicted fact that the presence of the picket placed on the construction job of the Respondent immediately resulted in unemployment and loss of work by certain of Respondent's employees as well as the refusal to deliver supplies and material to the job on the part of truck drivers and other carriers. These affidavits also show that the resulting work stoppage or cessation caused by the picket had effectively resulted in an interference with the Respondent's right to carry out its contract with the City of Atlanta. However, the most important fact established by these affidavits, which is uncontradicted, is that a demand was made to hire union workers on the particular job and after the refusal to do so, the union, through its representatives, stated that every means at the union's disposal would be used to see that union workmen were in fact used on the job. It should also be noted that there was no evidence introduced by the Petitioner at the interlocutory hearing in Fulton Superior Court to contradict the statements of Curry and Humphries except some general statement that the right to work statutes of the State of Georgia had not been violated, which of course was a mere conclusion on the part of the affiant. (Tr. Exhibit F, page 25.)

Certainly the strong uncontradicted statements contained in the affidavits of S. J. Curry and B. L. Humphries, Jr. in regard to demands for using union

labor that were made at the conference on the job site of February 14, 1961 substantiate the conclusion of the Supreme Court of Georgia that the actual purpose of the picket was to force Respondent to employ only union labor on its job or in the alternative to be unable to comply with the terms of its contract with the City of Atlanta because of the refusal of members of other unions employed on the construction job to cross the picket line.

The conduct of the Petitioner in the instant case is hardly consistent with its claim that it was only interested in placing the picket on its job for informational purposes. The conduct of the Petitioner prior to placing the picket on the job, that is, in arranging a conference at the job site with some eighteen business representatives present, coupled with the time lapse between the beginning of this job by the Respondent in December of 1960 and the placing of the picket on the job in August of 1961, is certainly inconsistent with any claim that the only interest of the Petitioner was public information or dissemination. Based on the evidence in the record as it is presently before this Court, can this Petitioner deny in good faith that the sole purpose of its picketing was not to hurt the Respondent, by publicity, and by annoyance of its presence and by preventing other needed employees from working on the construction site in question? Can it state in good faith that its only intentions were to get plaintiff to raise the wage standard on this particular job when in fact it knew and was charged with the

knowledge that its picket would bring about the condition complained of? In view of the demands made at the construction site at the initial conference, we think not, and we think that the conduct of the Petitioner is clearly indicative of the fact that its real intent and purpose was to bring such economic pressure to bear upon Respondent that it would be required to hire only union labor on this particular job.

As Justice Burton said in the *Graham* case, 345 U. S. 192, at page 201:

> "Based upon the findings of the trial court, we have a case in which picketing was undertaken and carried on with at least one of its substantial purposes in conflict with the declared policy of Virginia. The immediate results of the picketing demonstrated its potential effectiveness, unless enjoined, as a practical means of putting pressure on for the general contractor to eliminate from further participation all non-union men or all subcontractors employing non-union men on the project."

It is respectfully submitted that the Supreme Court of Georgia's judgment was well supported by the evidence in the record; and that the circumstances set forth in the opinion of that Court afford a rational basis for the inference it drew concerning the purpose of the picketing by the Petitioner. In this connection the Court's attention is invited to *Ellis, et al. vs. Parks*, 212 Ga. 540, 93 S. E. 2d 708; *Woodward, et al. vs. Collier, et al.*, 212 Ga. 239, 78 S. E. 2d 526, and *Powers vs. Courson, et al.*, 213 Ga. 20, 96 S. E. 2d 577.

CONCLUSION.

It is respectfully submitted that the Writ of Certiorari previously granted by this Court should be dismissed as improvidently granted for the reason that there is no final order or judgment for review by this Court. However, should this Court decide to consider the case on the merits it is respectfully submitted that the Supreme Court of Georgia has committed no error in the application of the right to work statutes of the State to the facts in the instant case nor has the Supreme Court of Georgia abridged any rights protected or outlined under the National Labor Relations Act.

Respectfully submitted.

By .....
H. H. PERRY, JR.
and

By .....
ROBERT B. LANGSTAFF,
Attorneys for Respondent in Certiorari.

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P. O. Box 747,
Albany, Georgia.

CERTIFICATE

I do hereby certify that I have this day served the Petitioners in the within case with copies of the foregoing brief of Respondent, by mailing a copy of the same to Mr. Edwin Pearce and Mr. John Patton, 1642 Bank of Georgia Building, Atlanta 3, Georgia, they being attorneys of record for Petitioners.

All of this on the .....day of September, 1962.

ROBERT B. LANGSTAFF

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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 57

LOCAL NO. 508, CONSTRUCTION & GENERAL LABORERS' UNION, AFL-CIO,

Petitioner,

vs.

E. [illegible] C. D. MACKNIGHT, JR., E. G. [illegible] AND J. E. [illegible], d/b/a S. J. [illegible] COMPANY, Partnership,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

BRIEF IN SUPPORT OF BRIEF OF PETITIONER IN CERTIORARI

[illegible]
[illegible]
ATTORNEYS FOR PETITIONER.

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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 87

LOCAL NO. 438, CONSTRUCTION & GENERAL LABORERS' UNION, AFL-CIO,

Petitioner,

VS.

S. J. CURRY, C. D. McKNIGHT, JR., E. G. HIGHTOWER AND J. S. TAPPAN, d/b/a S. J. CURRY & COMPANY, a Partnership,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

BRIEF IN REPLY TO BRIEF OF DEFENDANT IN CERTIORARI

The Reply Brief of Defendant in Certiorari, so far as the merits of the case are concerned, is almost en-

tirely based upon the position that the Courts of the State of Georgia have jurisdiction of this cause because the Georgia Right To Work Law is involved.

It is respectfully submitted that said position is without merit for the following reasons:

(1) If the actions alleged are either protected by or in violation of the National Labor Relations Act they would be preempted even if the State Right to Work Law had been violated.

(2) The evidence in this cause establishes beyond question that the State Right To Work Laws were in no way violated in this case.

THE SUBJECT MATTER OF THE CAUSE WOULD HAVE BEEN PREEMPTED EVEN IF THE GEORGIA RIGHT TO WORK LAW HAD BEEN VIOLATED

In support of this position Defendant in Certiorari cites several cases.[1]

The *Algoma Plywood* case was expressly repudiated by this Court in the case of *Building Trades Council*

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[1] *Algoma Plywood and Veneer Company vs. WERB*, 336 U.S. 301, 69 Sup. Ct. 584; *United Association of Journeymen, Plumbers and Steamfitters vs. Graham*, 345 U.S. 192, 73 Sup. Ct. 585; *Building Service Employees International Union vs. Gazzam*, 339 U.S. 532, 70 Sup. Ct. 784; *International Brotherhood of Teamsters vs. Hanke*, 339 U.S. 470, 70 Sup. Ct. 773; *International Brotherhood of Teamsters vs. Vogt, Inc.*, 354 U.S. 284, 77 Sup. Ct. 1166.

vs. Garman, 359 U.S. 236, 79 Sup. Ct. 773, in which the Court said:

> "The approach taken in that case in which the court undertook for itself to determine the status of the disputed activity has not been followed in later decisions and is no longer of general application."

None of the other cases cited by Respondent involved in any way the question of jurisdiction. It does not appear in said cases that it was shown that the employers were engaged in interstate commerce within the meaning of the National Labor Relations Act, and the question of jurisdiction was in no way raised or decided by the Court. All of said cases involved the single question of whether or not the State action deprived the Union of freedom of speech in violation of the Fourteenth Amendment to the United States Constitution. In the case at bar, this Court granted certiorari not on the issue of whether or not there was a violation of the Fourteenth Amendment but whether or not the State Court had jurisdiction. Counsel has cited cases dealing entirely with the question totally unrelated to the question of State Court jurisdiction.

In no case has this Court ever held that a State Court has the right to assume jurisdiction on the basis of its State Right to Work Laws if the alleged violation would also constitute a violation of the National Labor Relations Act or if the activity is protected

by the National Labor Relations Act. On the contrary, in the case of *Farnsworth & Chambers, Inc., vs. Electrical Workers*, 353 U.S. 969, the Supreme Court of the United States expressly held to the contrary. The Tennessee Supreme Court, 229 S.W. 2d 8, held that the State Court had jurisdiction under the State Right to Work Laws. The Supreme Court of the United States reversed this decision in a per curiam opinion, saying:

> "The petition for writ of certiorari is granted and the judgment of the Court of Appeals of Tennessee is reversed. See *Weber vs. Anheuser-Busch, Inc.*, 348 U.S. 468; *General Drivers, etc. vs. American Tobacco Co., Inc.*, 348 U.S. 978."

The Kansas Supreme Court in the case of *Asphalt Paving Company vs. Teamsters*, 41 LRRM, 2194, and the North Carolina Supreme Court in the case of *Douglas Aircraft Company vs. IBEW*, 41 LRRM, 2594, refused to assume jurisdiction of cases involving the State Right To Work Law on the basis of the *Farnsworth & Chambers* case.

THERE IS NO REASONABLE BASIS IN THE EVIDENCE FOR A FINDING THAT THE GEORGIA RIGHT TO WORK LAWS HAVE BEEN VIOLATED

In the case at bar the Supreme Court of the State of Georgia expressly holds (Tr. 43, 44) that peaceful picketing is not unlawful unless for an unlawful pur-

pose and then holds that the picketing was peaceful. It then holds that the trial judge was authorized to find from the evidence that the statement upon the picket sign that the petitioners were not paying wages conforming with those paid on similar types of work in the Atlanta area was true.

The Court then finds that Curry has no labor dispute with their employees and Petitioner in Certiorari is not representing employees of Curry. The Court seems at this point to be basing its decision on the fact that stranger picketing is involved and seems to be holding that the controversy involves wages.[2]

The Court, however, then states that "the facts of the preesnt case are similar to those in *Powers vs. Courson*, 213 Ga. 20, 96 S.E. 2d 577," and quotes from the *Powers* case in which case "the picket was placed on the job for the purpose of forcing Powers to employ only union labor".

This is not a clear ruling that the Right to Work Laws are violated, although it is quite possible to infer that the Court is so holding.

If the Georgia Supreme Court did so hold thereby overruling the Trial Court, which apparently held to the contrary, the Supreme Court of Georgia saying

[2] See very recent case of Waxman vs. Commonwealth of Virginia, 51 LRRM, 2221, (U.S. Citation not yet available) reversing 203 Va. 257, 123 S.E. 2d 381.

said laws are violated does not make them violated unless the evidence so reflects.

In the case of *Plumbers and Steamfitters vs. Graham*, 345 U.S. 192, 73 Sup. Ct. 585, this Court said:

> "In a case of this kind we are justified in searching the record to determine whether the critical finding by the State Courts had a reasonable basis in the evidence."

In the case of *Milkwagon Drivers Union vs. Meadowmoor Dairies*, 312 U.S. 287, this Court said:

> "Still it is of prime importance that no Constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of facts screening reality. That is why this Court has the ultimate power to search the records of the State Courts where a claim of unconstitutionality is effectively made."

It is contended that the Right To Work Law was violated because of the following facts:

On February 14, 1961, a meeting was held by Defendant in Certiorari with the Business Agents and Representatives of various Unions, as well as with Mr. James Moore, Representative of the Atlanta Building Trades Council. The testimony of Defendant in Certiorari was to the effect that at this meeting Mr. Moore and several unidentified persons represent-

ing several unidentified Unions stated that Union members must be employed on the project, and that they intended to see that this was done. The only evidence connecting the Petitioner in Certiorari to this conference was the statement in the affidavit of S. J. Curry, pages 8 and 9 of the transcript of the evidence, that "On or about February 14, 1961, I came to Atlanta, Georgia, to meet with representatives of various Unions in this area, including a representative of Construction and General Laborers Union No. 438". The only evidence with reference to who attended the meeting was the statement of Mr. Curry that "there was some 15 to 18 Business Agents and Representatives of various Unions present at this meeting. In addition there was a representative of the Building Trades Council of Atlanta, who I remember to be a Mr. Moore, and he appeared to be the spokesman for the group."

It may possibly be assumed from the above that a Representative of Construction and General Laborers Union No. 438, Petitioner in Certiorari, was present at this meeting, and it may possibly be assumed that such Representative was such Representative as had the authority to bind the Petitioner, and it may possibly be assumed that there was an obligation upon Petitioner in Certiorari to repudiate said statements. It is submitted that even if all of said assumptions are granted there can be no question from the evidence that the Right to Work Law was not in any way involved in the picketing for the following reasons:

There is not a scintilla of evidence in the record that any action was taken following said meeting to require the employment of Union labor. The picketing did not result until six months thereafter. The evidence is undisputed that it came to the attention of the Petitioner that the Defendant in Certiorari was violating its contract with the City of Atlanta in the payment of wages to its employees. It is undisputed that the company had executed a contract with the City of Atlanta containing the following language: "Wages will conform with those being paid on similar types of work in the Atlanta area". It was undisputed that the Defendant was not paying the wages conforming with those being paid on similar types of work in the Atlanta area but was paying only a little over one-half of said rate, thereby violating its contract with the City of Atlanta. (Tr. pages 19, 20, 23, 24, 26, 27, 28, 29).

It is undisputed and clearly established in the record that the Petitioner held numerous conferences with the City Attorney of the City of Atlanta and other Officials of the City of Atlanta throughout said six months period of time in which it sought to prevail upon the City to enforce its contract and to require the payment of the prevailing wage in the area. It is undisputed that it was made plain to the City that the Union had no complaint concerning the persons employed, but was merely insisting upon the upholding of the wage scale. It is undisputed that the Petitioner finally carried the matter before the City Board of Aldermen, which Board declined to do any-

thing about the matter, stating in its written minutes that there was nothing that the City could do to require Curry to raise its wage rates. There was not the slightest intimation in the record that at this hearing before the Board of Aldermen the Petitioner made the slightest request that Union people be hired and non-Union people fired. There is absolutely no evidence in the record that at any time during this six months interval immediately preceding the picketing the Union even intimated to anyone that it desired that only Union men be employed on the job. On the other hand, it is undisputed that throughout all of said time the Petitioner tried in every way at its command to prevail upon the City of Atlanta to enforce its contract as to wages. It was only after the action of the City Board of Aldermen, which exhausted the efforts of the Petitioner to prevail upon the City to take action to protect its interests as set forth in the contract, that the Petitioner erected a picket sign stating: "S. J. Curry & Company, Inc., violating contract with City of Atlanta by not paying wages conforming with those of a similar type of work in the Atlanta area. Construction and General Laborers' Union 438, AFL-CIO". (Tr. pages 3, 4, 5, 20, 21, 22, 25).

All of the facts relating to the conduct of the Petitioner between said meeting of February 14, 1961, and the date the picket line was erected on August 10, 1961, are totally and completely undisputed. As long as there was any possibility that the City would enforce its contract and require the Defendant in Cer-

tiorari to pay the wages required by the contract Petitioner in Certiorari refrained from engaging in any picketing action. Upon being rebuffed by the City Board of Aldermen, which stated that it could not require the City to raise the wage scale, there was no further avenue of persuasion to the City of Atlanta which was open. It was only after the Board of Aldermen had closed the door to any further efforts on behalf of Petitioner in Certiorari to have the wage scale conform to Defendant in Certiorari's contractual obligations that Petitioner in Certiorari resorted to its only remaining recourse, which was to publicize the facts relating to this breach of contract by means of legal, peaceful picketing. Petitioner showed an unusual amount of patience and resorted to picketing only as a last resort after all other possibilities had been completely exhausted over the course of many months.

STRANGER PICKETING DID NOT JUSTIFY ASSUMPTION OF JURISDICTION BY STATE COURT

There is no question of whether Petitioner in Certiorari was engaged in protected concerted activity within the meaning of Section 7 of the National Labor Relations Act by engaging in this picketing. As the Court is well aware, and as is established without contradiction by the evidence in this case, contracts in the construction industry are secured by means of competitive bids. The Defendant in Certiorari was enabled to present the lowest bid and se-

cure the contract because of the fact that it did not pay the wages paid by competitive contractors within the area. By failing to pay the prevailing wages Defendant in Certiorari was undercutting and destroying the entire wage structure within the area. The competing companies were and are faced with the choice of either losing competitive bids and being forced out of business or reducing their wage scales to the level of the competition of Defendant so as to compete on an even basis with Defendant with the eventual result that the entire wage structure and standard of living for the persons represented by the Petitioner in Certiorari will be completely destroyed. (Tr. 21, 22, 25). Those represented by Petitioner in Certiorari certainly have a right to engage in concerted activity for the purpose of publicizing this situation. This is particularly true where, as here, the terms of a contract with the City of Atlanta, which terms were incorporated in the contract for the purpose of preventing the above stated result, are being flagrantly violated.

In the *American Federation of Labor vs. Swing case*, 312 U.S. 321, the Court said:

> "A State cannot exclude working men from peacefully exercising the right of free communication by drawing the circle of economic competion between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry

has become a commonplace. *American Foundries vs. Tri-City Council*, 257 U.S. 184, 209. The right of free communication cannot, therefore, be mutiliated by denying it to workers in a dispute with an employer, even though they are not in his employ".

The National Labor Relations Board, in the case of *Plumbers and Pipefitters Union (Keith Riggs Plumbing and Heating Contractor)*, 50 LRRM, 1313, 137 NLRB No. 121, had before it a case for decision in which picketing had been engaged in to publicize a non-union employer's substandard wages and working conditions. The Board held:

"A labor union normally seeks to organize the unorganized and to negotiate collective bargaining contracts with employers, but also has a legitimate interest apart from organization or recognition that employers meet prevailing wage scales and employee benefits or otherwise employers paying less than the prevailing wage scale would ultimately undermine the area standards. Indeed the importance of maintaining area standards as a matter of public as well as Union interest was long ago endorsed by Congress by its enactment of the Davis-Bacon Act (40 U.S. Code, Sec. 273-A, etc.) relating to public contracts. It has application, of course, whether or not employees of public contractors are organized or have a collective bargaining contract."

In the case of *Weber vs. Anheuser-Busch*, 348 U.S. 468, the Supreme Court held that the States must decline jurisdiction where conduct is protected by Section 7 of the National Labor Relations Act just as where it is prohibited by Section 8. This position was reiterated in the *Garmon* and *Garner* cases.

It is our insistence that no law has been violated. However, if the actions of the Petitioner are coercive and seek to force the employees to join the Union they are a violation of Section 8(b)(2) and 8(b)(7) of the National Labor Relations Act.

The case of *Hotel Employees vs. Sax*, 358 U.S. 270, involved organizational picketing.

The case of *San Diego Building Trades Council vs. Garmon*, 359 U.S. 236, was one where the Union sought to compel the Company to execute a union shop contract when they did not represent the employees, and thereby to force the employees into the Union.

In the case of *Garner vs. Teamsters*, 346 U.S. 485, the Union was picketing for the purpose of inducing employees to join the Union.

In the case of *Meatcutters vs. Fairlawn Meats, Inc.*, 353 U.S. 20, there was involved an attempt by Union not representing the majority of its employees to compel an employer to force his employees into the Union.[3]

[3] See very recent case of Waxman vs. Commonwealth of Virginia, 51 LRRM. 2221. (U.S. Citation not yet available) reversing 203 Va. 257, 123 S.E. 2d 381.

All of said cases involved what is commonly known as "stranger picketing" even as is true in the case at bar; and in all of said cases the Supreme Court of the United States held that the issue had been pre-empted.

Not only is the State Court deprived of jurisdiction if it is established that the matter comes within the purview of the National Labor Relations Board but this Court has held that the State Court is deprived of jurisdiction if the subject matter of the case is even arguably protected or in violation of the National Labor Relations Act.

In the case of *San Diego Building Trades Council, etc. vs. Garmon*, 359 U.S. 239, 79 Sup. Ct. 773, the Supreme Court of the United States held:

> "At times it has not been clear whether the particular activity regulated by the States was governed by § 7 or § 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board. What is outside the scope of this Court's authority cannot remain within a State's power and state jurisdiction too must yield to the exclusive primary competence of the Board. See, e.g., Garner v. Teamsters, etc. Union, 346 U.S. 485, especially at pages 489-491, 74 S.Ct. 161, at pages 165-166, 98 L.Ed.

228; Weber v. Anheuser-Busch, Inc., 348 U.S. 468; 75 S.Ct. 480, 99 L.Ed. 546.

". . . It is not for us to decide whether the National Labor Relations Board would have, or should have, decided these questions in the same manner. When an activity is *arguably* subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." (Emphasis supplied.)

It is, therefore, plain that the Courts of the State of Georgia have assumed jurisdiction of a preempted field, and the purpose of Congress in enacting the National Labor Relations Act to secure uniformity in labor relations involving interstate commerce is being utterly and completely defeated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served five copies of the above Brief In Reply To Brief Of Defendant In Certiorari by mailing five copies of same, by registered mail, to Robert Langstaff, Attorney at Law, P. O. Box 747, Albany, Georgia, Attorney for Respondents.

This 1st day of November, 1962.

John S. Patton.